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VOL. 96 (2d Series) August 1-31, 1984 No. 1

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FEDERAL COMMUNICATIONS COMMISSION REPORTS

(96 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of
the Federal Communications Commission of
the United States**

VOLUME 96 (2d Series)

Pages 1 to 683

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Commissioner Fogarty's term expired June 30, 1983.
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Commissioner Sharp's term expired June 30, 1983.
*Sworn in December 2, 1983.

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–Dayton Telecasting, Inc.
BC Docket No. 81–617

Review Board granted in part an appeal and remanded proceeding to ALJ for further consideration of settlement agreement in light of evidence to be adduced on relative reception needs of communities, 47 CFR 73.3525 (b) and 47 USC 307(b), and certification of continued financial qualifications. Mutual exclusive allegation rejected because engineering showing failed to raise substantial and material question of fact.
–Wilson County B/c Services, Inc.
BC Docket 82–859

Application, Denial

Review Board affirmed ID and denied TV application for relocation of transmitter site. Loss of Grade B service to 9936 persons (white area) outweighed gains in first-thru-third service to 14,661 persons. CATV evidence not relevant to show mitigation in (white or gray) loss areas.
Elba Development Corp.
BC Docket 82–763

Application, Dismissal of

Dimsissal of application and issuance of summary decision on financial issue reversed and case remanded to ALJ for full hearing. Applicant had diligently prosecuted its application and was entitled to a continuance because of sponsoring witness's illness. Character issues not added against competing applicant.
–GAF B/cing Company
BC Docket No. 82-371

Alaska Communications System

Final Decision adopted regarding policies governing the ownership and operation of domestic satellite earth stations in Alaska Bush communities.
CC Docket No. 80-584

Broadcast Experience

Review Board denied reconsideration of Decision. Commission will not explore at hearing the broadcast experience or past broadcast record of an applicant absent an adequate threshold showing. Where exceptions to an Initial Decision have been filed, automatic stay precludes treating presently prevailing applicant as construction permittee holding media interest for diversification purposes in another proceeding.
–Old Time Religion Hour, Inc.
BC Docket No. 80–445

Broadcast Record, Past

Review Board affirmed grant of construction permit based on solid diversification preference, which overcame moderate comparative preference for ownership intergration, substantial past broadcast record preference, and slight auxiliary power preference. ALJ properly denied specialized programming issue. Limited weight given to ownership of weekly newspaper.
–Big Bend B/cers
BC Docket No. 82–559

(See also: Broadcast Experience-Old Time Religion Hour, Inc.)

Candor

In hearing matter of mutally exclusive applications for FM broadcast station, Review Board affirmed ALJ's grant. Board affirmed ALJ's resolution of certification and misrepresentation/lack of candor issues in favor of winning applicant and conclusion that integration criterion was decisional in this case.
–High Sierra B/cing, Inc.
BC Docket No. 81–637

CATV Notice of Proposed Rulemaking

Notice of Proposed Rule Making adopted to consider changes in the rules concerning the filing of registration statements pursuant to Section 76.12 of the Commission's Rules for the carriage of additional television signals by cable systems.
–Amendment of Part 76
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CATV Records for Public Inspection

(See: CATV Notice of Proposed Rulemaking-*Amendment of Part 76*)

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(See: CATV Notice of Proposed Rulemaking-*Amendment of Part 76*)

Common Carrier Authorization

Memorandum Opinion, Order and Authorization adopted regarding consolidated application of AT&T Co. and specified Bell System Companies for authorization under Sections 214 and 310(d) of Communications Act of 1934 for transfers, assignments, and other transactions.
–AT&T Co.

Notice of Proposed Rulemaking adopted proposing to authorize AT&T's separate subsidiary to provide basic service via limited or unlimited resale.
–AT&T Co.

Common Carrier Bureau

Order adopted regarding Common Carrier Bureau's analysis of effects of federal decisions on local telephone service. Record of this proceeding will be incorporated in CC Docket 78–72, Phase IV, 48 FCC 2d 30153.
–Local Telephone Service.

Common Carrier, Depreciation Rates, Prescription of

These Orders prescribe depreciation rates for the telephone companies and accounts/subaccounts shown in Appendices to the Orders.
–Depreciation Rates

These Orders prescribe depreciation rates for the telephone companies and accounts/subaccounts shown in Appendices to the Orders.
–Depreciation Rates

Common Carrier, Ownership of Facilities

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Common Carrier, Rates and Charges
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Common Carrier Rates, Integration

Commission initiated a *Notice of Inquiry* into the appropriateness of the existing rate integration policies for Alaska, Hawaii, Puerto Rico, and the Virgin Islands in light of recent Commission actions, authorizing competitive entry to these points for interstate telecommunication services.
–Rate Integration Policies
CC Docket 83–1376

Common Carrier Rates, Integration of Rates
(See: Common Carrier, Rates, Integration-*Rate Integration Policies*)

Comparative Criteria

In choosing an interim operator for facilities of former Station KHOF-TV, San Bernardino, California, the Board awarded decisive preference to applicant which had both minority and female ownership participation in addition to broadcast experience. Closest competitior had experience and female ownership but no minority participation.
–Angeles Broadcasting Network
MM Docket No. 83–1001

On remand, Review Board selects new broadcast permittee under standard comparative issue, concluding that superior qualitative ehancement credits for integrated minority and female ownership overcame credit for previous broadcast experience. The quantitative integration credit of two top applicants was too close to provide a clear comparative choice.
–New Continental B/cing Co.
BC Docket No. 79–305

Comparative Hearing

Review Board affirmed ID; granted comparative TV applicant with solid diversification and slight integration preferences. Loser had local noncommercial FM broadcast interests. Winner integrated its two general partners (local residents, one with broadcast experience); loser

had 87% credit enhanced by 18% minority ownership, residence, experience. Threshold showing of special minority sensitivity required.
–San Joaquin TV Improvement Corp.
BC Docket No. 82–552

Review Board denied reconsideration of its Decision, FCC 83R-91, released November 16, 1983. Winning television applicant has a diversification preference because principals of competing applicant have controlling ties to noncommercial broadcast stations within proposed service area.
–San Joaquin TV Improvement Corp.
Docket No. 82–552

Competition, Common Carriers
(See: Common Carrier, Authorization-*AT&T Co.*)

Computer II
Report and Order adopted terminating the License Contract Inquiry and concluding that, with modifications, AT&T's accounting systems provide reasonable assurance that administrative series are provided to AT&T-Information Systems on a fully cost compensatory basis.
–AT&T Co.
CC Docket No. 80–742

Control, Concentration of, Regional
Commission proposed to eliminate or relax the regional concentration of control provisions of Sections 73.35 (b) (1), 73.240 (a) (2), and 73.636 (a) (2) of the rules in view of the inconsistent and anamalous results produced by the present rule. Moreover, the significant growth in media outlets in recent years strongly suggests a need to reexamine the assumption underlying regional concentration limitations in general.
–Regional Concentration of Control

Control, Transfer of, Authorized
(See: Common Carrier, Authorization-*AT&T Co.*)

Cordless Telephones
Report and Order adopted amending Part 15 to relieve overcrowding of cordless telephone channels while the Commission contemplates permanent rule provisions.
–Cordless Telephones
Gen. Docket No. 83–325

Cross Interest
(See: Comparative Criteria-*New Continental B/cing Co.*)

Customer Premises Equipment
Commission adopted *Memorandum Opinion and Order on Recosideration* requiring American Telephone and Telegraph Company to transfer embedded customer premises equipment used in mobile telephone service to AT&T Information Systems.
–AT&T Co.

Depreciation Rate

Commission approved modified depreciation rates for six domestic telephone companies consisting of five Bell operating companies and the Continental Telephone Company of New York. These rates are based upon the straight line remaining-life procedure approved by the Commission in its *Report and Order* in Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration,* 87 FCC 2d 916 (1981).
–Depreciation Rates

Deregulation

(See: Customer Premises Equipment-*AT&T Co.*)

Diversification, of Control, of Mass Media

(See: Broadcast Record, Past-*Big Bend B/cers*)

(See also: Broadcast Experience-*Old Time Religion Hour, Inc.*)

(See also: Comparative Hearing-*San Joaquin TV Improvement Corp.*)

Divestiture

(See: Common Carrier, Authorization-*AT&T Co.*)

Engineering Data

(See: Agreement to Withdraw Application-*Wilson County B/c Services, Inc.*)

Financial Qualifications

Applications of the Public Broadcasting Service for national network of stations in the Instructional Television Fixed Service granted, and petitions to any denied, upon finding that applicant is legally and financially qualified, proposed programming service is permissible under Section 74.931 of the rules, and a grant of the applications will serve the public interest.
–Public B/cing Service

(See: Application, Dismissal of-*GAF B/cing Co.*)

(See also: Agreement to Withdraw Application-*Wilson County B/c Services Inc.*)

Forfeiture Mitigation, Request Denied

Request denied for recission of Commission's Rules regarding signal leakage and harmful interference to amateur radio operations.
–Sonic Cable TV

Frequency Equitable Distribution of, Under 307(b)

Review Board affirmed ID and granted ID application for relocation of transmitter site. Net loss of Grade B service to 1,116 persons (white area) outweighed by net gains in second service (7,353 persons), third (150,413), fourth (22,182), third network service (213,490), and by overall net gain of 194,455 persons. Current Commission policy bars consideration of translators and cable TV service as mitigating factors.
–KTVO, Inc.
BC Docket No. 81–326

(See also: Application, Denial-Elba Development Corp.)

Instructional Television Fixed Service
(See: Financial Qualifications-*Public B/cing Service*)

Issue, Enlargement of
(See: Application, Dismissal of-*GAF B/cing Co.*)

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(See Computer II-*AT&T Co.*)

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(See: Comparative Hearing-*San Joaquin TV Improvement Corp.*)

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Ownership Multiple
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Ownership of Stations, Limitations on
(See: Control, Concentration of, Regional-*Regional Concentration of Control*)

Programming
(See: Financial Qualifications-*Public B/cing Service*)

Programming Children's
Report and Order adopted terminating proceeding regarding TV programming for children. Given the totality of video programming sources and their offerings for children, constitutional concerns regarding interference with licensee's programming discretion, and regulatory anomalies that often result from inflexible standards, the Commission did not adopt specific quantification rules. It did, however, continue to recognize the obligation of the b/cer to serve children.

–TV Programming for Children
Docket 19142

Programming Specialized
(See: Broadcast Record, Past-*Big Bend B/cers*)

Publication, in Drop-out Case
(See: Agreement to Withdraw Application-*Wilson County B/c Services, Inc.*)

Real Party in Interest
(See: Candor-*High Sierra B/cing, Inc.*)

Reconsideration
(See: Broadcast Experience-*Old Time Religion Hour, Inc.*)

Reconsideration, Petition for, Denial of
(See: Comparative Hearing-*San Joaquin TV Improvement Corp.*)

Remand
(See: Comparative Criteria-*New Continental B/cing Co.*)
(See also: Application, Dismissal of-*GAF B/cing Co.*)
(See also: Agreement to Withdraw Application-*Wilson County B/c Services, Inc.*)

Review by Review Board
(See: Comparative Hearing-San Joaquin TV Improvement Corp.)
(See also: Application, Denial-*Elba Development Corp.*)

Rules, Amendment of
(See: Cordless Telephones-*Cordless Telephones*)

Satellite Earth Station, Joint Ownership of
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Service, Improvement of, B/c
(See: Frequency Equitable Distribution of, Under 307(b)-*KTVO, Inc.*)

Settlement
(See: Agreement to Withdraw Application-*Dayton Telecasting, Inc.*)

Shared Administrative Services
(See: Computer II-*AT&T Co.*)

Site Availability
(See: Candor-*High Sierra B/cing Inc.*)

Site Location
(See: Candor-*High Sierra B/cing Inc.*)

Subsidiary Company
(See: Computer II-*AT&T Co.*)

Summary Decision
(See: Application, Dismissal of-*GAF B/cing Co.*)

Television Station, Authorization
(See: Comparative Hearing-*San Joaquin TV Improvement Corp.*)

(See also: Frequency Equitable Distribution of, Under 307(b)-*KTVO, Inc.*)

White Area
(See: Frequency Equitable Distribution of, Under 307-*KTVO, Inc.*)

(See also: Application Denial-*Elba Development Corp.*)

CATV Notice of Proposed Rule Making
CATV Records for Public Inspection
CATV Registration Procedure

Notice of Proposed Rule Making adopted to consider changes in the rules concerning the filing of registration statements pursuant to Section 76.12 of the Commission's Rules for the carriage of additional television signals by cable systems.

–Amendment of Part 76
MM Docket No. 83–1292

FCC 83–554

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 76, Subpart B of the Commission's Rules and Regulations with respect to the filing of registration statements for the addition of television broadcast stations by cable systems (Section 76.12)	MM Docket No. 83–1292

NOTICE OF PROPOSED RULE MAKING

(Adopted: November 23, 1983 Released: December 5, 1983)

BY THE COMMISSION:

1. By this notice, we are proposing the elimination of the requirement for cable television system operators to file registration statements pursuant to Section 76.12 of the Commission's Rules, if they add a television broadcast station to an operational cable system.

2. This requirement was adopted in the Commission's *Report and Order in CT Docket No. 78–206* , FCC 78–690, 69 FCC 2d 697, 703–04 (1978). Essentially, it was a refinement of the Commission's more cumbersome certificate of compliance procedure, pursuant to former Section 76.11 of the Rules, which was established in 1972, in its *Cable Television Report and Order* , FCC 72–108, 36 FCC 2d 143, 217 (1972), *recons. granted in part* , FCC 72–530, 36 FCC 2d 326 (1972).[1]

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[1] Both certification and registration were important at the time, to alert television broadcast stations about signals being carried on the systems. This was important since it allowed stations to review cable system compliance with the Commission's signal carriage restrictions; these restrictions were abolished in 1981.

3. In addition to the requirement that cable operators file a registration statement pursuant to Section 76.12 of the Rules if they add a television broadcast station, cable operators are also annually required to file FCC Forms 325, Schedule 2, pursuant to Section 76.403 of the Commission's Rules, listing their entire complement of television signals as of a specified date. Therefore, much of the information generated by the filings pursuant to Section 76.12 of the Rules is presently being duplicated by the information obtained through the use of FCC Forms 325, Schedule 2. This duplication creates substantial paperwork burdens on cable operators and on the Commission's limited staff alike, and it appears to be the type of unwarranted burden the *Regulatory Flexibility Act* , P.L. 96–354, 94 Stat. 1165, 5 U.S.C. §§601–602 (1980), seeks to abolish and the sort of unnecessary paperwork that the *Federal Paperwork Reduction Act* , P.L. 96–511, 94 Stat. 2812, 44 U.S.C. §§3501–3520 (1980), targeted for elimination. Therefore, it is proposed to delete the requirement imposed on cable operators to file registration statements pursuant to Section 76.12 if they add a television signal, and comments are sought concerning what public interest purpose, if any, would be jeopardized by deletion of this requirement?

4. Authority for the rulemaking proposed herein is contained in Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended. Pursuant to Section 1.415 of the Commission's Rules, all interested parties are invited to file written comments on or before January 11, 1984 and reply comments on or before January 26, 1984. In reaching a decision on this matter, we may take into account any other relevant information before us, in addition to the comments invited by this *Notice* , provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order* .

5. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for

inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state by docket number the proceeding to which it relates. *See* Section 1.1231 of the Commission's Rules.

6. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth herein as Attachment A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall cause a copy of this *Notice* , including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Fexibility Act.

7. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and five (5) copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional six (6) copies. Members of the general public who wish to express their interest by participating informally in the rulemaking proceeding may do so by submitting one (1) copy of their comments, without regard to form, provided only that the docket number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission's Docket Reference Room at its Headquarters, 1919 M Street, N.W., Washington D.C.

8. Further information on the procedures to be followed or on the status of this proceeding may be obtained from Angela Green, Cable Television Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, 202–632–7480.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment A

Initial Regulatory Flexibility Analysis

I. Reason for Action:

The proposed action would eliminate the necessity to file a registration statement pursuant to Section 76.12 of the Commission's Rules whenever a cable television system adds a television broadcast station. Since the operator is annually required to report its signal complement by filing an FCC Form 325, Schedule 2, pursuant to Section 76.403 of the Commission's Rules, the utility of the information generated by the filings pursuant to Section 76.12 of the Rules for agency purposes has proved to be minimal. The dual reporting requirement, however, imposes considerable burdens on cable operators, as well as on the agency's staff, in terms of the collection and assimilation of the information generated. Elimination of the requirement would minimize the paperwork burden without adverse consequences to the public.

II. Objective:

The Commission proposes to eliminate the requirement that cable television operators file a registration statement, pursuant to Section 76.12 of the Rules, if they add a television broadcast station to an operational cable television system.

III. Legal Basis:

Action as proposed for this rulemaking is authorized by Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended.

IV. Description, Potential Impact, and Number of Small Entities Affected:

The proposed elimination of the filing requirement pursuant to Section 76.12 of the Rules would affect all cable television systems that add one or more broadcast signals per year. The proposed action if adopted should result in less paperwork obligations on cable operators and should also reduce the administrative or operating costs of cable systems.

V. Recording, Recordkeeping, and Other Compliance Requirements:

The proposed action would reduce the necessity for processing the information presently generated by the requirement to file registration statements pursuant to Section 76.12 of the Rules for the addition of television broadcast signals to operational cable television systems.

VI. Federal Rules which Overlap, Duplicate, or Conflict with this Rule:

Section 76.403 of the Commission's Rules provides for the periodic filing of FCC Form 325, Schedule 2 by cable television operators on which they report their complement of television broadcast stations as of a specified date.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives:

None.

VIII. Conclusions:

The Commission seeks to eliminate any unnecessary burdens on those it regulates. Its preliminary review indicates that the information generated by the requirement to file a registration statement pursuant to Section 76.12 of the Rules whenever a cable operator adds a television signal is more efficiently obtained by means of the requirement, pursuant to Section 76.403 of the Rules, to file a FCC Form 325, Schedule 2 report disclosing the cable system's entire complement of television signals as of a specified date. Accordingly, the Commission seeks comments from all interested persons regarding the proposed elimination of the former requirement.

Comparative Criteria
Operation Interim

In choosing an interim operator for facilities of former Station KHCF-TV, San Bernardino, California, the Board awarded decisive preference to applicant which had both minority and female ownership participation in addition to broadcast experience. Closest competitor had experience and female ownership but no minority participation.

–*Angeles Broadcasting Network*
MM Docket No. 83–1001

FCC 84R-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

ANGELES BROADCASTING NETWORK San Bernardino, California	MM Docket NO. 83–1001 File No. BPCTI-830418KG
UNITED MINORITY BROADCASTING OF SAN BERNARDINO, INC. San Bernardino, California	MM Docket NO. 83–1002 File No. BPCTI-830418KI
PARACHURCH CONSULTANTS, INC. San Bernardino, California	MM Docket NO. 83–1003 File No. BPCTI-830419KG
THE CHRISTIAN MEDIA AND EDUCATION FOUNDATION San Bernardino, California	MM Docket NO. 83–1004 File No. BPCTI-830419KH
JAMES L. OYSTER San Bernardino, California	MM Docket NO. 83–1005 File No. BPCTI-830419KI
ASIAN-AMERICAN BROADCASTING FOUNDATION San Bernardino, California	MM Docket NO. 83–1006 File No. BPCTI-830419KJ

CHRISTIANS AWARE San Bernardino, California	MM Docket NO. 83–1007 File No. BPCTI-830419KK
NOVA COMMUNICATIONS NETWORK, INC. San Bernardino, California	MM Docket NO. 83–1008 File No. BPCTI-830419KL
For Interim Authority to Operate the Facilities of Former Station KHOF-TV, Channel 30, San Bernardino, California	

Appearances

Morton L. Berfield, on behalf of Angeles Broadcasting Network; *Lawrence Bernstein*, on behalf of Maranatha Broadcasting Co.; *Leonard I. Joyce*, on behalf of Asian American Broadcasting Foundation; *Jeffrey D. Southmayd*, on behalf of Christians Aware; and *Bruce Eisen*, on behalf of Nova Communications Network, Inc.

DECISION

(Adopted: January 3, 1984; Released: January 16, 1984)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. This special comparative proceeding to select an interim operator for the television facilities formerly licensed to Station KHOF-TV, San Bernardino, California was referred to the Review Board by Commission Memorandum Opinion and Order, FCC 83–439, released October 4, 1983. The Board was directed, if possible, to adopt a decision by January 3, 1984. Four applicants now remain to be compared: (a) Angeles Broadcasting Network; (b) Maranatha Broadcasting Company; (c) Asian-American Broadcasting Foundation; and (d) Christians Aware. Four rounds of written statements have been filed, and oral argument was heard on December 2, 1983. Our decision is controlled by a recent Commission precedent, *Global Broadcasting Group, Inc.*, 54 RR 2d 404 (1983), modifying *Joseph Bahr*, 92 FCC 2d 114, 52 RR 2d 996 (Rev. Bd. 1982), and the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). The Board, having considered the comparative showings in the light of the applicable standards, has concluded that a very close choice must be made between the applications of Angeles and Maranatha. Both propose 100% participation of ownership in management of the station, but Angeles is preferred because its ownership is enhanced not only by broadcast experience and female ownership, but also by minority ownership.

2. *Background*: Channel 30, the UHF facilities of former television station KHOF-TV, San Bernardino, California, became avail-

able when the Commission denied license renewal sought by Faith Center, Inc., *see* designation Order, FCC 83–439, *supra*, para. 2. Eight applications for interim authority were designated for oral argument before the Board, in accordance with previous Commission practice and precedent. *Id.* at para. 4. Viewing an interim operator as "a caretaker until a regular operator is selected" the Commission required the successful "interim operator to distribute any net profits to qualified California non-commercial educational broadcast interests or charities in which the applicants have no direct or indirect interest." Id. at para. 5. To achieve this objective, specific conditions were set out which will be enforced by the Mass Media Bureau. *Id.* at para. 18.

3. All the interim applicants were directed by the Commission to file their comparative showings in writing within 20 days. *Id.* at para. 4. And the Review Board established the following procedural schedule:

(a) Pre-oral argument conference	November 4, 1983
(b) Opening briefs	November 18, 1983
(c) Replies, and final merger agreements	November 25, 1983
(d) Oral argument	December 2, 1983

After oral argument the applicants were afforded an additional opportunity to file written responses to any remaining questions by December 9, 1983. (Tr. 159)

4. United Minority, one of the original applicants, filed a notice of appearance as required by the Commission's designation Order, but it failed to file its comparative showing, nor did it comply with any of the other requirements specified above. Its application will therefore be dismissed for failure to prosecute. *See Filmway of Wisconsin*, 54 RR 2d 913 (Rev. Bd. 1983). Two other applicants, James L. Oyster, and Nova Communications, have voluntarily requested that their applications be dismissed. Their requests will be granted, the applications will be dismissed, and we note that the remaining applicants have submitted proof that they have not promised any consideration for the dismissal of these applications.

5. Leave to intervene has been sought by two individuals who claimed to be aggrieved by the Commission's decision refusing to renew the license of Faith Center, or to permit it to remain on the air on an interim basis. These matters are outside the scope of our jurisdiction and this proceeding since they have been finally resolved by the Commission. Although intervention has not been justified by the pleading of Ms. Melana James filed November 14, 1983, her pleading will be treated as a statement from a public witness, 47 CFR 1.225, because she claims that the applicants in this proceeding will not be able to lease Faith Center's antenna site, or an alternative site. However, the record reflects that the applicants have now submitted proof establishing, as contemplated by the Commission in

its designation Order, para. 6, FCC 83–439, that if Faith Center's site is not available another station in the area is willing to negotiate an agreement to make its site available to the interim operator authorized in this case. (Angeles Submission, dated December 9, 1983; Maranatha Additional Statement, Attach. 1; Aware Supplement, Ex. 8.) Similarly, the petition to intervene filed by Joseph A. Cortes on December 2, 1983 fails to raise a substantial or material question which is relevant to this proceeding and will also be denied. See 47 U.S.C. 309; 47 CFR 1.223.

6. All applicants were afforded another opportunity to enter into merger agreements by November 25, 1983. Two applicants, Parachurch Consultants and Christian Media and Education Foundation, did file a petition for leave to amend, and a joint request for approval of agreement on November 16, 1983, proposing to merge into a new applicant called Maranatha Broadcasting Co., Inc. No one has objected to the merger, although some questions have been raised about Maranatha's comparative showing. To the extent that these questions are relevant to a comparison of the applicants they will be discussed below. The petition for leave to amend, and the joint request for approval of agreement, as amplified by the materials filed on behalf of Maranatha on December 9, 1983, will be granted. *See Joseph Bahr, supra*, 92 FCC 2d at 118, 52 RR 2d at 998.

7. *Procedural and Substantive Standards*: As the Commission has explained in past cases, time is of the essence in this type of special comparative case to select an interim operator to restore or maintain service while a regular applicant is selected in a traditional trial type comparative hearing. It makes no sense to hold the same type of time-consuming hearing to select an interim operator. Interim applicants therefore have been encouraged to merge their interests and if unable to do so have been set for expedited oral argument before the Review Board *See e.g., Joseph Bahr, supra*. In the present case the four remaining applicants have had an opportunity to file a written comparative showing, opening briefs, replies, and participate in oral argument. They were then given an additional opportunity to respond to questions which were raised in the written and oral arguments. The Board is satisfied that all applicants have received ample notice of the issues being litigated, and have been afforded several opportunities to respond to the issues raised during the course of this expedited proceeding. As will appear below most of the relevant findings of fact proposed by the applicants are undisputed. A few questions which have been raised can be adequately resolved on the basis of the record which has been compiled after five rounds of written and oral statements.

8. As to the substantive standards in interim cases, the Board held in *Joseph Bahr, supra*, that it would be guided by the Commission's *Policy Statement on Comparative Broadcast Hearings, supra*. Subsequently, our *Bahr* decision was largely affirmed by the

Commission which did indicate that broadcast experience would be entitled to more weight in selecting an interim operator than it receives in regular comparative cases. The Commission reasoned that broadcast experience is entitled to more weight because: "In view of the limited duration of an interim operation, we find that an experienced broadcaster is at a decided advantage because it is difficult for interim operators to attract experienced, competent staff to run the station. Consequently, it is especially important that the interim operator have broadcast experience." *Global Broadcasting, supra,* 54 RR 2d at 408. Here we will be guided by the Commission's *Policy Statement*, and its recent decision in *Global*.

9. Maranatha, relying on the Commission's decision in *Global*, has urged that we should award it a preference for proposed programming because of the unique nature of this proceeding. Maranatha Br. 41–44. But here as in *Bahr*, we will follow the Commission's *Policy Statement*, 1 FCC 2d at 397–398, and not award a programming preference absent a showing of material or substantial differences. Moreover, as Maranatha candidly acknowledges it has failed to satisfy the threshold standards specified by the Commission in *George E. Cameron, Jr., Communications*, 71 FCC 2d 460, 45 RR 2d 689 (1979). *See also Big Bend Broadcasters*, FCC 83R-103, released December 30, 1983, para. 14. *Global* did not modify the Commission's requirements concerning what must be shown by an applicant which desires to obtain a preference for proposed programming. Maranatha has not satisfied those requirements.

10. *The Applicants*: All four remaining applicants are California non-profit corporations:

(a) *Angeles* is controlled by a three person board of directors. Gerald G. Barnard, the proposed general manager of the station; Glen A. Chambers, the proposed station manager; and Ms. Earlean Anthony, the station's proposed business manager.

(b) *Maranatha*, which grew out of a merger of Parachurch and Christian Media, will be controlled by four persons, two from each of the original corporations; William Welty, Business Manager; Timothy D. Waisanen, General Manager, Robert Billman as station manager; and Vera E. Waisanen, Sales Manager and Director of Personnel.[1]

(c) *Asian-American* has three directors: Mark Sung Soo Kim, General Manager, his wife Chung Ok Kim, Station Manager, and Byong Chul Cho, Program Manager.

(d) *Christians Aware* has three principals: Paul J. Toberty, General Manager; David Toberty, Sales Manager, and Ms. Georgan Perumean, Operations Manager.

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[1] Some of the applicants have contended that it was not clear from the merger agreement that the four individuals would actually be in control of the new corporation. A review of the FCC Form 301, application, p. 3, accompanying the petition to amend, filed November 16, 1983, and the additional corporate documents submitted by Maranatha, December 9, 1983, Atts. 2, 3, and 5, establish that it will be controlled by the four named individuals.

11. *Diversification of Control of the Media of Mass Communications*. When new broadcast applicants are being compared, diversification "constitutes a primary objective in the licensing scheme," *Policy Statement, supra,* 1 FCC 2d at 394, and "maximum diffusion of control of the mass media" is considered "a factor of primary significance." *See, e.g., Snake River Valley Television, Inc.*, 26 FCC 2d 380, 384–385, 20 RR 2d 644, 651 (Rev. Bd. 1970). Angeles, Maranatha, and Asian do not have any interests which would invoke the Commission's policy regarding diversification of media of mass communications. This finding is undisputed.

12. Aware acknowledges that Paul J. Toberty, by virtue of his ownership interest in Interstate Broadcasting Systems, Inc. and the Paul J. Toberty Financial Corporation, controls three radio stations which would be attributable to Aware: KYMS(FM), Santa Ana, California, KLTT(AM), Brighton, Colorado, and KRDS(AM), Tolleson, Arizona. The Paul J. Toberty Financial Corporation is jointly owned by Paul J. Toberty and his wife. Joyce Toberty. Aware maintains that Mr. Toberty has agreed to divest himself of all present broadcast interests should Aware's application be granted, and to comply with the Commission's condition which states (designation Order, *supra*, para. 19):

> **Prior to the commencement of operation, Christians Aware shall certify to the Commission that: (a) Paul J. Toberty has severed all interest in and connection with Interstate Broadcasting Systems, Inc. and (b) Paul J. Toberty and Joyce Toberty have severed all interest in and connection with Paul J. Toberty Financial Corporation or PJT has severed all interest in and connection with Interstate.**

Accordingly, Aware urges, the three broadcast interests are not attributable to it in this case. (Aware Br. 5–7)

13. The competing applicants in their opening briefs and again in their replies pointed out that the Commission's designation Order required divestiture not only by Mr. Toberty but also by his wife, Joyce Toberty. (Angeles Br. 19–21, Reply 8; Maranatha Br. 27–29, Reply 9–11; Asian Br. 26–27.) Nevertheless, Aware failed to show whether Mrs. Toberty had agreed to divest her interest in the three stations. This matter was also raised during the oral argument, Tr. 131–137, and Aware was reminded that it had another opportunity to clarify the record regarding Mrs. Toberty's plans. Tr. 154–158. Thereafter, it did submit an affidavit from Mrs. Toberty which stated that she would divest her interest in KYMS(FM), Santa Ana, California. Aware Supp., Ex. 9.

14. Despite clear notice that Mr. and Mrs. Toberty would both have to divest themselves of the three broadcast interests in the Commission's designation Order, FCC 83–439, paras. 8 and 19, in the briefs, replies and oral argument, Mrs. Toberty's affidavit indicates that she plans to divest only one station. But the Commission's designation Order clearly stated that "the broadcast interests of one

spouse are attributable to the other. *Miller & Shroeder*, 36 RR 2d 1699 (1976)." Thus, Mrs. Toberty's interest in the Colorado and Arizona stations are attributable to her husband and Aware. "Diversification is the primary objective toward which the comparative process is devoted." *Snake River Valley Television, Inc., supra*, 26 FCC 2d at 387. And the Commission has recently held that even distant California broadcast interests will be weighed along with a local broadcast interest to justify a moderate diversification demerit in a Michigan comparative case. *CJL Broadcasting, Inc.*, 54 RR 2d 1037, 1041–2 (1983). Aware will therefore receive a slight to moderate demerit for the two broadcast interests in Colorado and Arizona.

15. *Fulltime Participation in Station Operation by Owners*: This comparative factor emphasizes the "substantial importance" which the Commission attaches to new applicants which proposed to integrate ownership with management in the "day-to-day operation of the station." Highest credit is given for full-time "integration of stockholders exercising policy functions." *Policy Statement, supra*, 1 FCC 2d at 395. The Commission is "primarily interested in full-time participation and credit will drop sharply for less than full-time participation." *Absolutely Great Radio, Inc.*, FCC 83–464, released October 13, 1983, para. 9 (1983). An applicant's quantitative proposal can be enhanced by qualitative factors, attributes of the owners. *Policy Statement, supra,* 1 FCC 2d at 395–396. These factors include local residence, minority and female ownership, and broadcast experience, which in interim cases is entitled to special weight. *Global, supra*.

16. Here all applicants proposed to integrate their owners into meaningful policy positions, para. 10 above. The major quantitative difference is that Asian proposed to integrate only 66.7% of its ownership full time (33.3% part time) whereas the other three applicants propose 100% full-time integration.

17. Asian proposes to integrate all three of its principals into the operation of the proposed station: Rev. Mark Sung Soo Kim will participate part time, twenty-five hours per week, as the station's general manager. His wife, Chung Ok Kim, will be employed full time as station manager, and Mr. Byong Chul Cho will be the full-time program manager. Asian showing Exhs. 2, 5 and 8. Thus Asian is entitled to 66.7% full-time credit, and 33% part time. Rev. Kim and his wife reside within the primary service area at La Canada, as does Mr. Cho, who resides in Van Nuys. Their proposal is also enhanced by the minority status of all three principals, and 33.3% female ownership. Rev. Kim and Mr. Cho have some broadcast experience in presenting, producing, and directing religious oriented programming on Los Angeles stations. Asian Exhs. 4, 7, 10. Additional statement December 9, 1983. Asian also proposes auxiliary power for its transmitter and studio. Br. 3.

18. The other three applicants (Aware, Los Angeles, and Maranatha) propose 100% full-time integration so that a clear, quantitative difference exists between their proposals and that of Asian. "It is well established that qualitative attributes of participating owners may enhance the value of an integration proposal but cannot overcome clear quantitative differences." *Absolutely Great, supra*, at para. 9, and note 19. Thus, Asian cannot overcome the quantitative advantage of the other proposals even with its very slight preference for auxiliary power. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1981).

19. Aware proposes to integrate its principals: Paul J. Toberty will be the full-time general manager, David Toberty will be the full-time sales manager, and Ms. Georgan Perumean, the full-time operations manager. Aware Showing, Exh. 3. This proposal is enhanced by Paul J. Toberty's residence within the city-grade contour of the proposed station. Exh. 4, pp. 1–2. Both Mr. David Toberty and Ms. Georgan Perumean also live within the city-grade contour of the proposed station. Ms. Perumean receives credit for 33% female ownership. Both have broadcast experience and are members of the financial advisory board staff at KYMS (FM), Santa Ana, California; Mr. David Toberty has also been involved in broadcasting on KYMS (FM) as a part-time radio interviewer. Aware Exhs. 5, 6, and 7. Most significant is the broadcast experience of Mr. Paul Toberty in the ownership, construction operation of radio and television stations. From 1974 to 1978, he was director and during two years Chairman of the Board of the licensee of KTBN-TV), Fontana, California. During his tenure at KTBN, Mr. Toberty was responsible for supervising the planning and construction of the station's present facilities; he was also involved in the day-to-day management of the station, and was the host of a two-hour talk show. Exh. 4. Since 1981 he has been involved in the ownership and active management of the three stations previously mentioned, para. 12 above.

20. Aware's 100% full-time proposal is well enhanced by the residence of all its principals near the community of license, by its 33.3% female ownership, and by the broadcast experience of all of its principals. The broadcast experience of Mr. Paul Toberty is entitled to special recognition because it included ownership, operation, construction, and day-to-day management of both radio and television facilities. The experience of none of the other applicants can match Paul Toberty's experience. Thus, Aware would have received an integration preference over the other applicants in this case because of its superior broadcast experience. *Global, supra*. But here, unlike the *Global* case, Aware has received a diversification demerit and Commission precedent establishes that such a significant diversification demerit, on one of the pivotal comparative factors, cannot be overcome by a lesser integration preference, which is only

one of several factors that make up the overall preference for best practicable service. Thus, the choice in this case is reduced to a comparison of Angeles and Maranatha. *Big Bend Broadcasters, supra*, at para. 15.

21. Not unexpectedly Angeles and Maranatha attempted to undermine each other's comparative showing. The argument that Maranatha will not be controlled by its four principals has been previously considered and rejected. Note 1 above. Angeles also argues that Maranatha should not receive credit for Robert Billman's "full-time" integration proposal because his original showing did not specifically state that he would work 40 hours or full time at the station. (Angeles Reply pp. 3–4.) We disagree for several reasons: Parachurch's original exhibits were prepared by laymen unassisted by counsel; those exhibits did indicate that the principals were aware of the Commission's comparative policy statement on integration, and that they intended fully to meet those standards. Any ambiguity has been resolved by Billman's subsequent vertified statement that he always intended to participate 40 hours or full time in the interim operation of that station. *See e.g. Maranatha*, Br. p. 6, note 9. Billman's proposal to participate full time will be credited and the argument attacking his proposal will be rejected.

22. Maranatha urges that Angeles should not receive credit for Rev. Barnard's proposal because he resides in Solona Beach which is allegedly outside the service area of the interim operation. This claim is rejected because Maranatha has not supported it with the contour map of former station KHOF TV (Tr. 84). Moreover, the written testimony of Angeles is supported by Aware's Exh. 7, which shows that Solona Beach is included within the proposed service area. Angeles Reply, note 1. Maranatha also claims that Barnard will not be able to effectuate his proposal to participate full time in the station's operation because it takes approximately 2 1/2 hours to travel between San Bernardino and Solona Beach. Barnard's verified response is that he does not intend to make the trip daily but to make additional housing arrangements in or very near San Bernardino, and that if it is necessary to fulfill his commitment he will relocate his primary residence in or near San Bernardino. (Angeles Submission dated December 9, 1983.) This response which is consistent with other facts in the record, see para. 23 below, is accepted and Maranatha's argument is rejected.

23. Maranatha's final argument is that Barnard has not shown how he will rearrange his other commitments so that he can spend forty hours at the proposed interim operation. Maranatha, Br. 22–25. Barnard's comparative showing establishes that since 1972 he has been the pastor of a church in San Diego, and that he is now assisted by three full-time associate pastors, and other paid staff members. Exh. 2, pp. 2–3. In 1973, Barnard began appearing on television programs, and later formed a television production company in the

Los Angeles area. Included in his present production staff are persons who have been trained to assume more executive responsibilities. If Angeles is successful in obtaining interim authorization, Barnard will curtail his production activities to accommodate his commitment to work at least forty hours per week at the station. If necessary the production company will employ additional staff so that he can satisfy his commitment to the FCC. Angeles Exh. 2, pp. 3–4. Maranatha's speculative arguments which ignore the record showing before us will be rejected, and Barnard's integration proposal, like that of all the other applicants, will be credited.

24. Angeles will integrate its three principals into full-time managerial positions: Barnard as general manager, Chambers as station manager, and Ms. Anthony, a black female, as business manager. All reside within the service area of the proposed station; Barnard in Colona Park, Chambers in Glendale, and Anthony in Pomona, California. Angeles also receives credit for Ms. Anthony's 33% minority and female ownership. Angeles Exhs. 2, 3, and 4.

25. Barnard and Chambers have broadcast experience which began in 1956 when they both appeared on radio and television in Michigan. In the 1970's Barnard appeared on television in the Los Angeles area. Later he produced and hosted religious programs in the San Diego area. In 1975, he created the Christian Communications Network to produce programs for cable television systems, and has continued to appear on religious programs which are broadcast nationwide. Barnard has also produced religious programming in Israel with the cooperation of the Israeli Department of Tourism, and in St. Peter's Basilica, at the invitation of the Vatican. Angeles Exh. 2, pp. 3–4. Chambers' broadcast experience also began in radio and television in Michigan during 1956. Since 1974 he has appeared on television in the Los Angeles area, where he heads a congregation which is 95% Black, and includes Ms. Anthony who is a volunteer teacher. His television appearances in the Los Angeles area included an appearance on KHOF-TV. For the past four years he has been an announcer on a weekly television program which is broadcast on more than seventy stations throughout the nation. Angeles Exh. 3, p. 4.

26. Maranatha will integration its four principals full time: Robert Billman, as Station Manager, William Welty, Business Manager, Timonthy D. Waisanen, General Manager, and his wife, Vera E. Waisanen, as Sales Manager and Director of Personnel. Welty and Billman both reside within the proposed service area and propose to relocate to San Bernardino if they are successful in this proceeding. Mr. and Mrs. Waisanen presently reside in Garden Grove within the proposed service area, and also propose to relocate. Maranatha receives credit for Mrs. Waisanen's 25% female ownership; she, like Ms. Anthony of Angeles, does not have any broadcast experience.

27. Billman, Welty, and Mr. Waisanen all have broadcast experience. Billman began acquiring broadcast experience in 1964 at a Florida television station while attending college. During the next five years he was promoted from Director to Head Director and Assistant Production Manager. His experience also includes camera operation, lighting, set designing, and construction. In 1971 he was consultant during the construction of a Dallas television station and in 1974 he assisted in the construction of a Florida television station. In late 1977 he formed an independent television production company which he is still operating. Billman and Welty have worked together in television production during the late 1970s. Earlier, from 1972 to 1974, Welty worked on the conceptual development of a satellite-linked news network for the broadcast of public relations information to radio and television stations. Maranatha Br. 8–9. Waisanen in 1980 began working in the production of a nationally syndicated religious television program, "Hour of Power." Initially he was a marketing coordinator, and later was director of marketing planning and trategy. In July of 1982, he left the program to pursue his independent career goals. Maranatha Br. 16.

28. *Summation*: This 90 day special comparative proceeding was ordered by the Commission to expedite selection of an interim operator to restore service formerly provided by Faith Center's KHOF-TV in the San Bernardino area. KHOF-TV had specialized in providing religious programming. By the time oral argument was held in this case four applicants remained to be compared. All proposed to restore religious programming to the area. In accordance with past precedent, however, proposed programming has not been shown to be a relevant comparative factor in this case, para. 9 above. Under the primary diversification factor, Aware has received a decisive demerit which in effect eliminates it from further comparison because on the other factors the applicants are very close, para. 18 above. The other decisive comparative factor is participation of ownership in management of the station. It requires us to focus first on the quantitative aspects of the proposals: Asian's proposal is significantly less than those of Angeles and Maranatha, and the 33% difference is sufficiently "clear" so that it cannot be overcome by qualitative differences. See para. 18 above.

29. A final choice must be made between Angeles and Maranatha. Both propose to integrate 100% of their ownership into meaningful management positions and are therefore quantitatively equal. Thus, the case ultimately turns on the qualitative aspects of these proposals. *See Global, supra*. Both applicants are enhanced by local residents and broadcast experience. Guided by *Global* we have closely scrutinized the broadcast experience of both applicants. While Angeles seems to have a slight edge in length and depth of broadcast experience in appearing on and producing religious programming, Maranatha seems to have a slight edge in terms of

diversity in the type of experiences. The differences, if any, with regard to broadcast experience and local residence are too slight to be deemed decisional. One distinction between the applicants does stand out, however. That is, Maranatha's proposal is enhanced by 25% female ownership whereas Angeles is enhanced by 33% minority *and* female ownership. This difference, while slight, is significant enough under existing precedent to tip the comparative scales in favor of Angeles. *See Alexander S. Klein*, 86 FCC 2d 423, para. 23 (1981); *Las Missiones De Bejar*, 93 FCC 2d 517, 53 RR 2d 119, paras. 9–10 (Rev. Bd. 1983). In *Horne Industries, Inc.*, 54 RR 2d 249, 258 (Rev. Bd. 1983), we followed general Commission guidance and held that minority or female ownership in amounts less than 50% were insufficient to warrant a "significant comparative qualitative enhancement" because such ownership levels carried no strong assurance of viewpoint diversity. However, we did note that lower levels of such ownership could be "decisional in otherwise deadlocked cases." *Id.* This is such a case. Therefore, a grant of Angeles' application will best serve the public interest, convenience, and necessity.

30. ACCORDINGLY, IT IS ORDERED, That James L. Oyster's October 7, 1983 letter request for dismissal of his application IS GRANTED; and his application IS DISMISSED; that the motion to dismiss filed November 18, 1983, by Nova Communications Network, Inc. IS GRANTED; and its application IS DISMISSED: and that the application of United Minority Broadcasting of San Bernardino, Inc. IS DISMISSED, see para. 4, *supra*; and

31. IT IS FURTHER ORDERED, That the petition to intervene and motion to appear and proceed in *forma pauperis* and affidavit in support thereof, filed by Melana James on November 18, 1983, ARE DENIED; and that the petition to intervene and motion to appear and proceed in *forma pauperis* filed December 2, 1983 by Joseph A. Cortes ARE DENIED, see para. 5 above; and

32. IT IS FURTHER ORDERED, That the joint request for approval of agreement and dismissal of application, and petition for leave to amend, filed November 16, 1983, by Parachurch Consultants, Inc. and The Christian Media and Education Foundation, as clarified on December 9, 1983, ARE GRANTED, see paragraph 6 above; and

33. IT IS FURTHER ORDERED, That the petition to supplement direct case filed December 9, 1983 by Christians Aware IS GRANTED; and the motion to strike comments of Maranatha filed December 14, 1983 by Angeles Broadcasting Network IS GRANTED; and

34. IT IS FURTHER ORDERED, That the application of Angeles Broadcasting Network, File No. BPCTI-830418KG, IS GRANTED subject to the conditions specified in paragraphs 18 and 20 of the Commission's Memorandum Opinion and Order, FCC 83-434, re-

leased October 4, 1983; and the applications of Maranatha Broadcasting Company, Asian-American Broadcasting Foundation, and Christians Aware ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

Common Carrier Carrier, Authorization
Control, Transfer of, Authorized
Divestiture
License, Assignment of, Common Carrier

Memorandum Opinion, Order and Authorization adopted regarding consolidated application of AT&T Co. and specified Bell System Companies for authorization under Sections 214 and 310(d) of Communications Act of 1934 for transfers, assignments, and other transactions.
–*AT&T Co*.

FCC 83–566

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
The Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application.	File No. W-P-C-4955

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

(Adopted December 1, 1983 Released December 23, 1983)

BY THE COMMISSION: CHAIRMAN FOWLER CONCURRING AND ISSUING A STATEMENT.

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I. *INTRODUCTION*

1. The Commission has before it the above-referenced application of the American Telephone and Telegraph Company (AT&T) and certain specified Bell System Companies for authorization under Sections 214 and 310(d) of the Communications Act, 47 U.S.C. §§214, 310(d),[1] for various transfers of facilities necessary to implement the

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[1] 47 U.S.C. §214 provides, in pertinent part, that:

> [n]o carrier shall . . . acquire or operate any line . . . or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation . . . of such additional or extended line . . . . No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby . . . .

47 U.S.C. §310(d) provides, in pertinent part, that:

> [n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Modified Final Judgment (hereinafter referred to as MFJ or Consent Decree) in *United States v. American Telephone and Telegraph Co* .[2] The MFJ mandates the largest corporate reorganization in United States history by requiring AT&T to separate facilities and personnel relating to exchange telecommunications and exchange access functions and printed directories from other functions, including the provision of interexchange service and the provision of embedded customer premises equipment. The separation required by the MFJ commonly is referred to as the divestiture of the Bell System Operating Companies (BOCs).

2. In reviewing the application, this Commission has attempted to define the principal effects of divestiture on telecommunications service users. In weighing the benefits and detriments of divestiture that we foresee, we conclude that it is likely that the divestiture, as implemented by the transfers of facilities set forth in the application before us, will be in the public interest, although there will be some costs involved and there is a potential for some service problems. Briefly, we believe that divestiture will increase competition in the telecommunications services and equipment markets and that if increased competition in these areas does develop, in the long run the American public will benefit from generally lower prices for ratepayers and an increase in the types of services offered. While there will be costs incurred in implementing divestiture, we have determined that certain administrative costs must be borne by AT&T shareholders. Thus those costs will have no impact upon ratepayers. With respect to other divestiture-related costs, we find we have insufficient information to determine whether those costs should be borne by the ratepayers. At the same time, we have determined that even if those costs are included in recognized operating accounts for ratemaking purposes, they should not be so great as to have a negative impact on the availability of service. In addition, although we believe that there may be some degradation of service, most of it will be either transitory or very minor. The potential for degradation of service stems primarily from certain rerouting of traffic necessary to implement divestiture and potential problems in establishing standards and determining maintenance responsibilities among the various carriers.

3. While we conclude that it is likely that the benefits of approving the various transfers of facilities necessary for the divestiture to proceed as scheduled outweigh the problems that would be caused by delaying or denying the transfers, we recognize that much of our analysis of both the benefits and costs of divestiture is based upon assumptions as to future developments in the industry that may not, in fact, occur. Thus, we have decided to condition the

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[2] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom* . Maryland v. United States, 103 S. Ct. 1240 (1983).

grant of this application upon the post-divestiture submission of certain information by AT&T and the regional holding companies, which will hold the stock of the divested operating companies. We intend to monitor carefully the implementation of the divestiture and should developments that are detrimental to the American public occur, we intend to take whatever action is necessary to mitigate those effects.

II. *BACKGROUND*

A. *The Telecommunications Industry Today*

4. Today AT&T is the corporate parent of an integrated telecommunications network known as the Bell System. This system, which provides the vast majority of telecommunications services in the United States, is composed of AT&T, which provides overall direction and control of the operating divisions and companies; the Long Lines Department, which provides interstate toll service; AT&T Information Systems, which provides customer premises equipment (CPE) and enhanced services;[3] Western Electric, which manufactures telecommunications equipment; Bell Telephone Laboratories (Bell Labs), which provides research and engineering support for other parts of the company; AT&T International, which markets products and services overseas; and the 24 BOCs, which provide local, intrastate toll, and some interstate toll, service within their serving areas.[4]

5. AT&T is the largest privately-held utility in the world. Through the BOCs it provides local service in the contiguous 48 states and the District of Columbia to approximately 85 million telephones, or 80% of all telephones.[5] The Long Lines Department and the BOCs in partnership with the independent telephone companies provide over 90% of the common carrier long distance telephone service in the United States by interconnecting the territories served by the BOCs and independent companies.[6] Long Lines also provides connections to foreign countries.

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[6] The remainder of the long distance service is provided primarily by "other common carriers," or OCCs, such as MCI Telecommunications Corporation and

[3] AT&T Information Systems is the new name given to what was American Bell, Inc. American Bell, Inc. was formed pursuant to this Commission's order in the Second Computer Inquiry, 77 FCC 2d 384 (1980), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983), which required AT&T to offer customer premises equipment and enhanced services through a separate subsidiary on a detariffed basis.

[4] AT&T wholly owns 22 of the 24 associated telephone companies, and holds minority interests in Cincinnati Bell Telephone Co. and Southern New England Bell Telephone Co.

[5] The remaining telephones are served by approximately 1,500 independent telephone companies. Although the independent telephone companies serve over 50% of the land mass of the United States, these companies tend to operate in less populated areas and thus serve far fewer persons than the Bell companies.

6. In order to provide its services, the Bell System has approximately $150 billion in assets (mostly telephone plant) and employs over one million people. Its total operating revenues for 1982 were $65 billion and its net income was $7.3 billion.[7] By way of comparison Exxon, which was ranked first on the Fortune 500 list of industrial companies for 1982, had total revenues of approximately $97 billion, net income of $4.2 billion and 173,000 employees.[8]

7. In addition to being one of the largest companies in the world, AT&T generally is considered to provide some of the highest quality services. This Commission has reviewed the performance of the Bell System for more than 45 years and, although we have been critical of certain areas of its operation and structure in the past (we have, for example, noted problems inherent in the integrated structure of the Bell System), in general we have found that it provides high quality, reliable telephone service.[9]

B. *The Consent Decree*

8. On November 20, 1974, the United States Department of Justice filed suit in the United States District Court for the District of Columbia (hereinafter referred to as the D.C. Court or the Court) against AT&T, Western Electric and Bell Labs alleging various violations of the antitrust laws. Among other things, the government alleged that AT&T monopolized the intercity telecommunications market and the telecommunications product market in violation of the Sherman Act[10] by using its control over the BOCs to preclude competition in both these markets. As a remedy for the alleged violations the government sought the divestiture from AT&T of the BOCs and Western Electric.[11]

9. After pretrial discovery, which narrowed the scope of the proceeding, the trial began on January 15, 1981. Immediately thereafter the trial was recessed for several weeks at the request of AT&T and the Justice Department so that the parties could attempt to reach a negotiated settlement. The negotiations failed, however, and the trial resumed on March 4, 1981. At the end of the government's case AT&T filed a motion to dismiss the action, which was denied on September 11, 1981.[12] Then, on January 8, 1982, after

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GTE-Sprint Communications Corporation. While some of the OCCs have grown tremendously in the past few years, none of them has more than a very small percentage of the entire intercity telephone service market.

[7] AT&T, 1982 Annual Report.

[8] Standard and Poor's, Standard NYSE Stock Reports (Aug. 9, 1983).

[9] *See* AT&T, 64 FCC 2d 1, 10 (1977), *reconsideration*, 67 FCC 2d 1429 (1978).

[10] 15 U.S.C. §§1-7.

[11] At various times while the action was pending, the government amended its relief requests, including a request for divestiture of portions of Bell Laboratories.

[12] United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981).

presentation of most of AT&T's defense, the parties announced that they had reached agreement on a proposed Consent Decree.

10. The Decree provides for a major restructuring of the Bell System.[13] Section I of the Decree provides for the separation within the BOCs of all facilities, personnel and books of account relating to "exchange telecommunications" or "exchange access functions" and those relating to other functions (*e.g.*, interexchange functions and the provision of customer premises equipment to the public) and the transfer of ownership (divestiture) of the separated portions of the BOCs providing exchange telecommunications and access services from AT&T to the shareholders of AT&T. After divestiture AT&T is prohibited from acquiring the stock or assets of any BOC.[14] Section I also provides that AT&T and its affiliates will transfer to the BOCs "sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications and exchange access functions . . . " and requires AT&T, Western Electric and Bell Labs to provide the operating companies with support services until September 1987 so that the operating companies can fulfill their obligations under the Decree.

11. Section II of the Decree articulates various requirements to which the divested operating companies must adhere. Perhaps the most important of these is the requirement that each operating company provide to all interexchange carriers exchange access on an unbundled, tariffed basis that is "equal in type, quality and price to that provided to AT&T and its affiliates." The operating companies also are prohibited from discriminating between AT&T and other persons with respect to procurement of products and services and the dissemination of technical information and interconnection standards. After divestiture, the operating companies are forbidden from: entering the interexchange telecommunications services or information services markets; providing or manufacturing telecommunications products; manufacturing customer premises equipment;[15] and providing "any product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff."[16]

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[13] The Decree, as amended, is reprinted in the District Court's opinion entering the Decree. *See* 552 F. Supp. at 226.

[14] For purposes of the Decree the BOCs include only the wholly-owned operating companies. AT&T is not required under the Decree to divest its holdings in Cincinnati Bell Telephone Co. or Southern New England Bell Telephone Co.

[15] The Decree as initially signed prohibited the operating companies from providing CPE. Pursuant to the modifications required by the court in its August 11, 1982 decision on the MFJ, however, the BOCs will be permitted to provide, but not manufacture, customer premises equipment, and will be able to produce and distribute printed advertising directories (the "Yellow Pages").

[16] The Department of Justice interprets this provision as allowing the divested

12. Finally, under Section I(A) of the Decree, AT&T was required to formulate a plan of reorganization to implement the Decree and to submit the plan to the Department of Justice within six months after the court approved the Decree.

13. The proposed Decree was styled as a modification of Final Judgment (MFJ) of a Consent Decree that had been entered into between the Justice Department and AT&T in 1956 terminating a previous antitrust action brought against AT&T in 1949 in the United States District Court for the District of New Jersey.[17] Upon signing the proposed Decree, the parties filed the Decree with the New Jersey Court and requested the New Jersey Court to transfer jurisdiction over the 1956 Decree and any proceeding relating to its modification, to the D.C. Court. In addition, the parties filed a stipulation in the D.C. Court to dismiss the 1974 action. The New Jersey Court, however, approved the proposed Decree and then transferred the 1949 action to the District of Columbia where it was consolidated with the 1974 action. The D. C. Court then vacated the order approving the proposed Consent Decree and ordered that the stipulation of dismissal simply be "loged" pending completion of procedures equivalent to those required under the Tunney Act.[18]

14. Pursuant to the Tunney Act procedures established by the court, this Commission filed a brief as amicus curiae on April 20, 1982.[19] We concluded that the basic settlement was reasonable and likely to enhance competition and that, with certain modifications,

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operating companies to provide any service defined as "exchange telecommunications" or "exchange access" even if it is not a natural monopoly service actually regulated by tariff. For example, the Decree is not a bar to the operating companies offering cellular radio service because the service is regarded to be an exchange telecommunications service. *See* Letter from James P. Denvir, Dept. of Justice, to Harry M. Shooshan, Aug. 24, 1983. *See also* Department of Justice Competitive Impact Statement, 47 Fed. Reg. at 7176 n.23 (1982).

[17] The action brought in 1949 had alleged various violations of the Sherman Act and had sought the divestiture of Western Electric from AT&T and the compulsory licensing of patents held by AT&T on a nondiscriminatory basis. On January 24, 1956, the New Jersey District court accepted a consent decree (hereinafter referred to as the 1956 Consent Decree) that barred AT&T from engaging in any business other than the provision of common carrier services subject to public regulation and services incidental thereto, barred Western Electric from manufacturing any equipment other than that used by the Bell System, and required AT&T and Western Electric to license their patents to all applicants in exchange for royalty fees. *See* United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶68,246 (D.N.J. 1956).

[18] The Tunney Act provides that an antitrust Consent Decree submitted by the United States may not be entered by the court until there has been a sixty day comment period, publication of a competitive impact statement by the Department of Justice, and a determination by the court that the Decree is in the public interest. 15 U.S.C. §16(e).

[19] On March 4, 1982, we issued a public notice soliciting comment from interested persons on the MFJ. On March 24, we heard oral presentations from 30 parties. The written and oral presentations were considered by the Commission in our Tunney Act brief.

the settlement should be approved by the court. We noted that our preliminary assessment of the divestiture was that it would "not affect the rates or quality of any telecommunications service in a manner that conflicts with the Communications Act goals."[20] At the same time, we stated our intention to perform a more comprehensive examination of the effects of the divestiture on rates and services in the instant proceeding.

15. Although our conclusion was that the basic settlement was reasonable, we believed that certain modifications should be made to the agreement. Specifically, we urged the court to adopt the following revisions:

1. Deletion of the restrictions on post divestiture business activities of the divested BOCs;
2. If the business activity restrictions on the BOCs were not lifted, addition of certain clarifications relative to the business operations of the BOCs;
3. Addition of a provision specifically acknowledging that nothing in the Decree affects the powers of this Commission;
4. Addition of a provision to allow the Commission to seek clarification or modification of the Decree; and
5. Addition of a provision that the Decree would automatically expire in ten years unless the Department of Justice applied for continuation and the court found that a continuation was in the public interest.

16. In addition to the amicus brief submitted by this Commission, the court received comments from interested parties and held several days of hearings. On August 11, 1982, the court issued an order approving the proposed Decree as being in the public interest on the condition that certain modifications be made. Of particular importance to this Commission with respect to the application before us is a modification that provides that jointly used facilities should be assigned to the BOCs if the use made by the BOCs predominates over the use made by AT&T. Consistent with this Commission's recommendations, other modifications lifted restrictions that had been placed on the to-be-divested BOCs.[21] The court also modified the

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[20] Brief for FCC as Amicus Curiae, Civ. Action No. 74-1698, at 7 (April 20, 1982).

[21] Among other things, the modifications provided that:

1. The BOCs be allowed to provide, but not manufacture, customer premises equipment;
2. The BOCs be permitted to print and distribute "the yellow pages";
3. Restrictions on the BOC lines of business would be removed if there was no substantial possibility that the BOC could use its market power to impede competition in the market it was going to enter;
4. AT&T be prohibited from engaging in "electronic publishing" over its own transmission facilities for at least 7 years;
5. If an operating company provides billing services to AT&T, it must include in

Decree to provide that the plan of reorganization that AT&T was required to formulate under the MFJ must be approved by the court. With these modifications, the court found that the proposed Decree was in the public interest. The court concluded that AT&T's ability to engage in anticompetitive conduct stems largely from its control of the BOCs, and that divestiture of the local operating companies would diminish this ability to disadvantage intercity and equipment competitors.[22]

C. *The LATA Proposal and Plan of Reorganization*

17. The Consent Decree requires the BOCs to separate personnel, assets and facilities relating to exchange functions from those relating to interexchange and other functions and prohibits the divested Bell Operating Companies from providing interexchange telecommunications service. This necessitated a determination of the boundaries of each exchange. Because the Decree definition of "exchange"[23] is somewhat different from the definition traditionally used in the telephone industry,[24] the new "exchange" areas had to be defined physically. In order to avoid confusion, the parties began calling the Decree-defined exchange areas "Local Access and Transport Areas" or "LATAs".

18. In October of 1982, AT&T and the BOCs filed an application with the court for approval of the proposed LATAs. Based on a number of factors, including external community of interest indications such as Department of Commerce and other official area designations and telephone traffic patterns and existing serving arrangements, the BOCs proposed to establish 161 LATAs. The number of LATAs varies among the states: several states, mostly the less populated states, were configured as one LATA, while fifteen LATAs were proposed for the state of Texas.[25]

19. Two months after the LATA application was filed, AT&T

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the bill a statement that there is no connection between the BOC and AT&T;

6. Any BOC offering less-than-equal access to an interexchange carrier must reflect the lesser cost, if any, of providing such access in its tariffs;
7. At the time of divestiture the BOCs should have debt ratios of approximately 45%, except for Pacific Telephone and Telegraph Co. which should have a debt ratio of 50%.

[22] *See, e.g.*, 552 F.Supp. at 162.

[23] *See* Section IV(G) of the Decree.

[24] For example, Section 3(r) of the Communications Act, 47 U.S.C. §153(r), defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge." Thus, the traditional definition relies primarily upon the non-toll or toll nature of a call to determine whether the call is an exchange or interexchange call.

[25] Unlike traditional exchanges, the LATA does not establish the area in which a telephone call will be "local" from that in which it becomes "toll" or long

filed its "Plan of Reorganization" with the court. Part I of the Plan specifies the principles and procedures for separating those facilities, employees, and books of account of the Bell Operating Companies relating to intraLATA, LATA access, and printed directory functions, which will be retained by the divested BOCs, from those relating to other functions, such as interLATA services and customer premises equipment,[26] which will be retained by AT&T. Part I also contains rules and procedures for identifying personnel functions that relate to the facilities and for selecting employees who will perform those functions after divestiture.

20. The basic principles outlined for the separation of network facilities are simple: first, ownership of facilities used solely for intraLATA telecommunications or LATA access functions will be assigned to the BOCs; second, ownership of facilities used solely for interLATA functions will be assigned to AT&T; and, finally, multifunction facilities will be assigned to whichever entity is projected to be the predominant user of the facility as of January 1, 1984.

21. These same rules apply whether the facilities are used for public switched, private line, or private network services.[27] The Plan also summarizes how these principles will be applied to several categories of plant: switching equipment, other central office equipment and outside plant. The Plan specifies that all switching systems providing only end office (Class 5) functions or local tandem functions will be assigned to the operating companies.[28] This accounts for approximately 9,300 switching systems of the approximately 9,890 switching systems currently in the Bell System.[29] In contrast all switching systems used solely to provide Enhanced Private Switched Communications Service, Common Control Switching Arrangement or Autovon services will be assigned to AT&T, because of the largely interLATA nature of the services and the

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distance. Whether a call is "local" or "toll" depends not on the size of the LATA but upon the rate structure in effect after divestiture.

[26] Although the District Court modified the Decree to provide that the divested operating companies may provide, but not manufacture, customer premises equipment, AT&T will retain the embedded CPE at divestiture. *See also* Detariffing of Customer Premises Equipment, CC Dkt. 81–893 (adopted Nov. 23, 1983).

[27] Plan of Reorganization at 11. These principles are consistent with the predominant use test required by the court.

[28] A "class 5" or "end" office is a local, as opposed to toll, office. The switches in these offices connect subscriber loops (the transmission path between the customer premises equipment and the class 5 office) to other subscriber loops and subscriber loops to interoffice trunks.

[29] *See* AT&T Reponse to Comments and Objections Relating to Proposed LATA Configurations, Civil Action 82–0192, Appendix B (filed Nov. 23, 1982). All the switching figures are approximations as switches are constantly being introduced and retired from the network.

difficulty of separating the intraLATA calls from the interLATA calls.

22. Although the general rule required by the Decree for determining which entity will own the remaining 550 multifunction switching systems is the predominant use test, the Plan provides for two important exceptions to this rule. First, the Plan proposes to assign the 370 multifunction switching systems providing end office (Class 5) functions to the BOCs regardless of the predominant use test. Second, to assist in meeting intraLATA traffic demands in 12 LATAs, each of which contains a large metropolitan area, the Plan assigns to the BOCs more large multifunction tandem switching systems than would be assigned to them under the predominant use test. By our calculation, AT&T will be assigned approximately 150–160 switching systems and the BOCs will own the remaining switching systems.[30]

23. The Plan also discusses the application of the predominant use test to central office equipment other than switches. For example, Common Channel Interoffice Signaling (CCIS) equipment, which forms a separate network providing interoffice signaling for interLATA traffic, will be assigned primarily to AT&T because of the predominant interLATA use. Operator call processing systems and associated operator work centers used to provide directory assistance and intercept service will be assigned to the BOCs, because such services are predominantly provided for intraLATA calls. Operator systems and work centers used to provide "call completion" and 800 service directory assistance, on the other hand, will be assigned to AT&T because of the predominant use for interLATA calls. Finally, "Common Central Office Equipment," which includes power equipment, distributing frames, testing equipment, and cabling, is to be assigned to the entity owning the switching, circuit, or radio equipment that the common equipment serves.

24. With respect to outside plant, the BOCs will be assigned nearly all investment in the subscriber loops and all transmission facilities serving only an intraLATA function (*e.g.*, circuits connecting end offices to local tandem switching systems). In addition, pursuant to Section IV (F) of the MFJ transmission facilities between a Class 5 office and a Class 4 office in the same LATA generally will be assigned to the BOCs. With one exception, the Plan provides that AT&T will be assigned all the cables performing solely interLATA functions. The exception covers transmission facilities containing only circuits that connect a Class 5 switching system in one LATA with a Class 5 switching system in another LATA. These facilities will be assigned to the BOCs. The Plan justifies this exception by stating that "the BOCs must be permitted the flexibility to route their traffic in accordance with volume demands until the BOCs can

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[30] *Id.*

rearrange their facilities to route all interLATA calls to an interexchange carrier's POP [point of presence] within the LATA."[31] This rerouting generally will be completed within five years after divestiture.

25. Part I of the Plan also outlines the procedures for allocating liabilities, reserves and equity accounts. Depreciation reserves are to be allocated to plant based on reserve-to-investment ratios calculated for vintage groups. The assignment of related unamortized investment credits to AT&T for each vintage rate category will bear the same proportional relationship to the total unamortized credit balance for that category as the net book value of assets assigned to AT&T in that category bears to the total net book value of those assets. The separation of depreciation reserves will allow assets to be transferred at net book amounts, and the separation of tax reserves will allow normalized tax accounting to continue with respect to depreciation and tax credits attributable to transferred assets. Similarly, current liabilities, and other deferred credits and reserves that relate directly to physical assets, functions, or personnel assigned to AT&T for post-divestiture operations will be assigned to AT&T. All other amounts will remain with the BOCs because they do not encumber any particular asset or operation.

26. The Plan provides that the allocation of debt will not follow the assignment of particular assets. Instead, the allocation will be controlled by the Decree, which requires that the BOCs be divested with debt ratios of approximately 45 percent, except for Pacific Telephone and Telegraph Company, which will have a debt ratio of approximately 50 percent. The debt ratios will be computed as the proportion of the divested BOC's total short-term and long-term debt to the BOC's total debt and equity capital as of the time of divestiture.

27. The assignment of employees between AT&T and BOC units follows the functional split of facilities and other assets between intraLATA, LATA access, and printed directory services for the BOCs and interLATA services and CPE for AT&T. Employees will follow their work.[32] Immediately after divestiture all employees, regardless of the company to which they are assigned, will be provided pension, savings and other employee benefits comparable to those provided before divestiture.

28. Part II of the Plan describes the augmentation of the BOCs to ensure that each BOC will be able to carry out intraLATA, LATA

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[31] Plan of Reorganization at 48 (footnote omitted).

[32] Based on preliminary estimates of assignment of assets and functions between AT&T and the BOC entities, AT&T projects that, of approximately one million current employees, 830,000 will remain in their current jobs and with their current companies, and 90,000 will change companies but will not change locations or job functions. Approximately 30 to 40 percent of the Bell System's current employees will be retained by AT&T.

access, and printed directory functions independently of AT&T after divestiture. Facilities, personnel, and rights to technical information will be transferred from AT&T, Western Electric, and Bell Laboratories to the BOCs or a Central Staff Organization.[33] For example, computer software and resources relating to centrally developed administrative and network operations systems will be transferred to the BOCs in order to aid them in the provision of intraLATA and LATA access services. In addition, the BOCs will be granted, royalty free, the rights to existing patents and all patents issued for a period of five years following the approval of the Decree.[34]

29. Within the Central Staff Organization, the BOCs will establish a specialized government communications group to coordinate the development and implementation of technical standards and national security and emergency preparedness plans. This group will be the single point of contact (required by Section I(B) of the Decree) for national security matters.

30. Part III of the Plan describes how the License, Standard Supply, and Division of Revenues contracts will be terminated as required by the Decree.[35] Basically, all such contracts will be cancelled by agreements executed at the time of divestiture.

31. Finally, Part IV of the Plan describes the transactions that will be necessary to implement divestiture. The first step will be the separation, within the BOCs, of the intraLATA and LATA access assets from the other assets. This will be accomplished through the creation by each BOC of two wholly-owned subsidiaries to which the BOC's interLATA facilities and CPE, respectively, will be transferred. In exchange for the facilities, each BOC will obtain common stock of the new subsidiaries. The BOCs then will distribute the stock of these subsidiaries to AT&T. AT&T, in turn, will contribute its stock in the reconfigured BOCs to seven newly created regional holding companies (RHCs). AT&T will then spin off the seven RHCs to the AT&T shareholders. At the same time, AT&T will transfer its

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[33] The Decree permits the BOCs to support and share the costs of a centralized organization (hereinafter referred to as Central Staff Organization) for the provision of engineering, administrative, and other services and requires a single point of contact for national security and emergency preparedness. A task force of BOC presidents, appointed January 28, 1982, concluded that certain operations should continue to be centralized and that AT&T should transfer certain resources to the BOCs' Central Staff Organization. They concluded that the Central Staff will need approximately 8,800 employees, about ¾ of whom will be transferred from AT&T.

[34] Initially, the Plan did not allow the BOCs the rights to patents relating to interexchange communications or CPE. The District Court, in its opinion on the Plan of Reorganization, required AT&T to grant non-exclusive licenses to use telecommunications equipment covered by *all* patents owned by AT&T or to be issued within five years. *See* para. 34 *infra*.

[35] *See* Part I(A)(3) and Appendix B of the Decree.

intraLATA facilities, of which there are relatively few, and the assets described in Part II of the Plan to the BOCs.

32. Thus, after divestiture each BOC will consist of intraLATA and LATA access facilities and will be held by one of seven regional holding companies. Each RHC will be approximately the same size in terms of assets and number of lines served and will provide service in a particular region of the country.[36] Post-divestiture AT&T will consist of the corporate parent; Western Electric; Bell Labs; AT&T Information Systems which will receive the embedded CPE; AT&T International; and the AT&T interexchange organization, which has been given the name AT&T Communications.[37]

D. *The District Court Rulings on Implementation of the Decree*

33. The court's opinions on the LATAs and the Plan of Reorganization were issued separately. On April 20, 1983, the court approved 138 of the 161 proposed LATAs.[38] In its opinion the court noted that the major issue raised by interested persons had been the relative size of the proposed LATAs. The court concluded that small LATAs would tend to favor interexchange carriers because the operating companies, which cannot provide interLATA service, would be confined to serving smaller areas.[39] Large LATAs, on the other hand, would benefit both the BOCs (because they would be able to provide service over greater areas) and to some extent the interexchange carriers (because they would be required to establish fewer points of presence).[40] In large part, because of concerns over the viability of

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[36] A map of the seven Regional Holding Companies, together with general information on total assets and lines served is attached hereto as Appendix B.

[37] In its response to the Common Carrier Bureau's letter of July 8, 1983, *see* para. 54 *infra*, Applicants clarified the status of the interexchange subsidiaries (IXCs) after divestiture. The IXC subsidiaries will retain separate corporate status within AT&T and will not be merged into other subsidiaries or departments of AT&T. After divestiture, interexchange carrier functions will be handled by AT&T Communications, which will consist of a national interexchange corporation, an interstate division of AT&T, and 22 regional interexchange corporations. The national interexchange corporation will own no communications assets itself but will manage and direct AT&T's interexchange operations. The 22 regional interexchange corporations will operate the interLATA assets assigned to them at divestiture and, under the direction of the national interexchange corporation, will coordinate with the other interexchange corporations and the interstate division. The interstate division, which will be the successor to Long Lines, will remain a division of AT&T.

[38] The court also required that six LATAs be divided into two parts, required eight LATAs to be merged into four and withheld decision on nine LATAs pending the submission of further information.

[39] At the same time, the court found that small LATAs could discourage competitive entry by interexchange carriers in remote areas.

[40] "Point of presence" is the term used to describe a point within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC and at which the BOC must deliver and receive interexchange traffic.

the BOCs after divestiture, the court rejected the argument that all the LATAs were too large and should be reconfigured to be coextensive with local calling areas. At the same time, the court was concerned that, with the establishment of large LATAs, the BOCs not block competition for intraLATA service through discriminatory access provisions. Thus, the court stated that LATAs involving two or more Standard Metropolitan Statistical Areas would not be approved unless the BOC involved agreed to provide equal access to all interexchange carriers for intraLATA toll traffic.

34. Several months after ruling on the LATAs, the District Court ruled on the Plan of Reorganization.[41] In its order the court also disposed of most of the remaining questions relating to the configuration of the LATAs. The court advised the parties that it would rule favorably upon the Plan if the parties accepted several modifications. In major part, however, the court found that the Plan was consistent with the principles of the Decree and that the division of network facilities and other assets provided for in the Plan was reasonable. The changes the court ordered were:

1) That if by January 1, 1994, the operating companies have not recovered the actual costs incurred by them of providing equal access and network reconfiguration[42] through access charges imposed on the interexchange carriers, AT&T would reimburse the operating companies in the amount of the remaining deficit;[43]

2) AT&T may not use the word "Bell" in its corporate name or that of its subsidiaries, except for Bell Labs, and may not use the Bell trademark or logo after divestiture;

3) AT&T must grant to the Operating Companies non-exclusive and personal royalty-free licenses to use equipment covered by all existing patents and patents issued within 5 years of divestiture;

4) The operating companies may provide their own interLATA official service communications (*i.e.*, BOC internal communications);

5) The operating companies may not provide order writing exclusively for AT&T; and

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[41] Oral argument was held on June 2, 1983 on the allocation of the costs of equal access, the distribution of contingent liabilities arising from antitrust suits filed against AT&T, the assignment of the Bell name and logo, and the assignment of patents.

[42] The court, relying upon an AT&T memorandum dated May 23, 1983, at 4 n. **, 5 n. *, states that these costs are estimated to be $73 million to reconfigure the network and $2.47 billion to provide equal access. We note that the equal access figure is lower than the figure supplied to this Commission. *See* paras. 42–43 *infra*.

[43] This condition was amended by subsequent court order to provide that AT&T's obligation would be discharged to the extent that any operating company fails to file tariffs designed to recoup the costs by 1994, any regulatory commission refuses to permit such tariffs to take effect, or any regulatory requirements relating to depreciation cause any portion of the investment not to be recognized as a cost of ratemaking prior to 1994.

6) AT&T and the operating companies must bargain in good faith with any labor union except with respect to certain subjects covered by the Plan of Reorganization.

III. *THE CONSOLIDATED APPLICATION*

35. On January 14, 1983, the Commission sent to AT&T a letter requesting that the applications necessary for transfer of facilities to implement the Consent Decree be filed no later than March 1, 1983.[44] In order to minimize the effort of AT&T and the BOCs, we waived Section 21.5(b) of the rules, which generally requires separate applications to be filed. On a more substantive level, we reiterated our intention to perform a comprehensive examination of the effects of divestiture on rates and services in the consolidated application proceeding and thus we asked AT&T and the Bell Operating Companies to address certain questions in a public interest narrative to accompany the applications. Specifically, we asked the applicants to: 1) describe the expected divestiture-related costs (both plant and expenses) that had already occurred and that they anticipated each year for the next 5 years; 2) discuss the assumptions and methodologies that were used to derive these costs; 3) state to what account or accounts these costs would be charged and what impact, if any, these costs would have on ratepayers; 4) discuss what technical changes will result from the proposed planned changes in the network and any changes in the planning process; 5) discuss how the equal access requirements of the MFJ will be satisfied; and 6) discuss the effect of the MFJ on the national security and emergency preparedness and the functions that will be performed by the Central Staff Organization.

36. On March 1, pursuant to our letter, AT&T and the specified Bell Operating Companies filed a consolidated application requesting authorization under Sections 214 and 310(d) of the Communications Act for transfers of lines, assignments of radio licenses and transfers of control of corporations holding radio licenses. The application involves only facilities for which initial authorization already has been granted by the Commission. No new facilities are involved. Applicants also requested authority "for those transactions that may be considered discontinuances of service within the meaning of Section 214." Applicants questioned, however, whether the transfers described in the application constitute a discontinuance of service to a community within the meaning of Section 214 since "uninterrupted telecommunications service will be continued to all communities presently served by the Bell System."[45]

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[44] At the same time, we recognized that some facilities to be transferred might not be identified by March 1 so we allowed AT&T to amend its application until July 1, 1983 to include additional facilities.

[45] Consolidated Application at 2 n. *

37. The application briefly describes the transactions that will implement the Consent Decree and includes a public interest statement as we had requested in our January 14 letter. Exhibits to the application include several of the documents relating to the U.S. District Court proceeding (*e.g.*, the Plan of Reorganization) and a document entitled Current Planning for Equal Access. In addition, the exhibits contain information on the specific facilities sought to be transferred and new Common Carrier and Satellite Radio Qualification Reports (Form 430) for the operating companies. Exhibit 11 is a list of cable and lightguide interstate lines to be transferred from 19 of the BOCs to AT&T and 4 lines to be transferred from AT&T to New Jersey Bell. Exhibits 12 and 13 contain FCC Forms 702 filed by 20 of the BOCs relating to the assignment of point-to-point microwave construction permits and licenses; FCC Forms 435 and 436 filed by 22 interexchange subsidiaries (IXCs) to be owned by AT&T[46] and Forms 436 filed by the BOCs relating to partial assignments to the IXCs of point-to-point microwave construction permits and licenses; FCC Forms 703 filed by 22 BOCs relating to the transfer of control of corporations holding Telephone Maintenance, Experimental, Private Operational Fixed Microwave, Maritime Radio, Business Radio, Citizens Band, Aviation and General Mobile licenses; and FCC Forms 704 filed by 22 BOCs relating to the transfer of control of corporations holding Point-to-Point, Local Television, Developmental, Domestic Public Land Mobile and Rural Radio Service licenses and having filed Digital Electronic Message Service applications.[47]

A. *The Public Interest Statement*

38. In its "Public Interest Statement" Applicants argue that the structural reorganization required by the Consent Decree is compatible with various policies that this Commission has initiated over the past two decades. Applicants note that during this time this

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[46] As is explained above, *see* para. 31 *supra*, the transfer of interLATA facilities to AT&T will be accomplished by the creation of interexchange subsidiaries by the BOCs, which then will be transferred to AT&T through a stock dividend. At the time of the filing of the application, the IXCs had not yet been formed and they were identified simply as "IXC subsidiary" together with a geographic designation.

[47] Cellular radio applications are not included in the Consolidated Application because those applications are subject to the cellular proceeding. Cellular Communications Sys., 86 FCC 2d 469 (1981), *recon.*, 89 FCC 2d 58, *further recon.*, 90 FCC 2d 571 (1982). In a letter to the Commission, AT&T explained that the AT&T cellular subsidiary to be created, AT&T Cellular Co., "will be reorganized as contemplated by the Modified Final Judgment . . . with the result that after such reorganization and divestiture all cellular licenses will be held by affiliates of the respective separated Bell Operating Companies . . . ." Letter to William J. Tricarico, Secretary, FCC, from Michael R. Greene, Vice President, AT&T, March 1, 1983.

Commission has encouraged competition in the provision of telecommunications equipment,[48] and in the provision of intercity service.[49] Noting that the MFJ removes the 1956 Consent Decree's restrictions on Bell's entry into new markets and allows Bell System participation in the telecommunications equipment market, applicants assert that grant of the consolidated application and implementation of the Consent Decree is consistent with, and will encourage, competition in the telecommunications equipment market, and is consistent with our *Second Computer Inquiry* decision.[50] Furthermore, applicants state that implementation of the Consent Decree will facilitate the establishment of uniform, nondiscriminatory access charges for all intercity carriers, which in turn should facilitate intercity competition.

39. The applicants also state that implementation of the Consent Decree is in the public interest because the reorganization will remove much of the uncertainty about the future structure of the telecommunications industry that has hung over the industry since the antitrust action was filed. Applicants argue that:

> This uncertainty has hindered future planning activities by telecommunications policymakers as well as traditional carriers, information service providers, manufacturers of telecommunications and data processing equipment, and the customers for such services and equipment. The effect of this cloud of uncertainty has been to stall major decisions and slow the pace of innovation in this country at a time when foreign countries are making all-out efforts to displace the United States as the worldwide leader in information technologies. Without this reorganization, continued and expanded controversy could have been expected in the industry . . . with ever-increasing negative effects upon the development of information products and services in this country.[51]

40. According to the applicants, the competitive benefits of the divestiture can be obtained without diminishing the quality of service provided by AT&T and the operating companies. Applicants note that this Commission and the state regulatory bodies will retain jurisdiction to ensure that carriers provide adequate service at reasonable rates and that both AT&T and the operating companies will have sufficient facilities and resources to continue to provide service in accordance with the Communications Act. All administrative, operational, and engineering systems that support the facilities will be made available to both the operating companies and AT&T,

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[48] Applicants cite Carterfone, 13 FCC 2d 420, *recon. denied*, 14 FCC 2d 571 (1968), and Telerent Leasing Corp., 45 FCC 2d 204 (1974), *aff'd sub nom.* North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[49] Applicants cite Microwave Communications, Inc., 18 FCC 2d 953 (1969), *recon. denied*, 21 FCC 2d 190 (1970), and Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *aff'd sub nom.* Washington Utilities & Transportion Commission v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[50] Second Computer Inquiry, *supra* note 3.

[51] Consolidated Application at 25.

either by duplicating the systems or by sharing agreements between AT&T and the operating companies. Service performance and generic equipment standards for the operating companies will be established by the Central Staff Organization, which will be staffed in large part by former AT&T personnel. Addressing concerns about the operating companies' viability post-divestiture, applicants state that the exchange service markets are substantial and that the operating companies' distribution facilities are an important gateway to information. Applicants also note that pursuant to Section VIII (H) of the Consent Decree, the operating companies will be divested with debt ratios of approximately 45% except that the Pacific Telephone and Telegraph Company will have a debt ratio of approximately 50%, which applicants believe will ensure that the operating companies will be divested in sound financial condition.

B. *Costs of Divestiture*

41. Various questions raised in our letter of January 14 are also addressed in the application. With respect to the costs of divestiture, applicants responded that the bulk of the network costs relating to the MFJ are expenditures associated with 1) implementation of the divestiture[52] and 2) the provision of equal access.

42. Costs required to implement the divestiture include, according to applicants, costs incurred by AT&T to add transmission capacity between AT&T points of presence[53] and costs incurred by the BOCs to reroute existing interLATA end office (Class 5 to Class 5) and toll connect (Class 5 to Class 4) traffic. These costs were estimated as follows:

Divestiture Related Costs 1983 - 1987[54]
($ Million)

	Transmission	*Switching*
Plant (Capital) Expenditures:	8	181
Network Expenses:	0	90

43. The cost estimates associated with the provision of equal access include the costs of 1) deploying additional carrier access features such as dialing and signaling capabilities, 2) upgrading existing tandem switching systems and installing new tandems, 3) installing additional trunking and 4) equipping end office and access tandems with call recording capability. These costs were estimated as follows:

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[52] Applicants described "implementation of divestiture" as "those activities or changes required by the functional separation of the existing integrated network into separate intraLATA and interLATA networks and the prohibition against provision of interLATA service or the routing of interLATA service for any interexchange carrier by the BOCs." Consolidated Application at 51.

[53] *See* note 40 *supra*.

[54] Consolidated Application at 53.

Equal Access Related Costs 1983 – 1987[55]
($ Million)

	Transmission	*Switching*
Plant (Capital) Expenditures:	91	1,376
Network Expenses:	0	1,197

44. In discussing the equal access-related costs, applicants state that a "substantial portion" (estimated at over one billion dollars) of these costs would have been incurred even without the Consent Decree. They explain that prior to the signing of the Decree, AT&T had planned and begun projects that were designed to provide the OCCs with improved interconnection.

45. In response to our question relating to the impact, if any, that these costs will have on ratepayers, applicants state only that:

> Many of the costs shown above will be recovered through exchange access charges. In cases [in which] the investment in newly constructed plant . . . cannot be identified exclusively with exchange access because the plant will also provide added capacity for BOC intraLATA services, the costs of the new plant may be recovered through both exchange access tariffs and the tariffs governing BOC provision of intraLATA services.[56]

C. *Technical Changes in the Network*

46. In our January 14th letter to AT&T, we also requested that applicants discuss the technical changes that will result from the divestiture and its effect on planned changes to the network. The first effect, according to applicants, will be the rearrangement of facilities caused by the prohibition against operating company provision of interexchange services. Primarily this will involve an increase in operating company access trunk requirements and AT&T tandem switching system capacity. Modifications to the local networks also will be necessary to provide equal access to all carriers. For example, switches will have to be modified to measure access traffic. In addition, various network operating systems that provide joint maintenance and network management functions will be affected and some of these systems may have to be duplicated.

47. Certain previously planned changes in the network will also be affected by the divestiture. For example, applicants state that CCIS,[57] which was expected to be deployed locally, may now remain primarily in the intercity network. Each operating company will make its own determination as to whether it should implement CCIS on the local level. Several planned changes to routing systems will

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[55] *Id.* at 56.

[56] *Id.* at 60.

[57] *See* para. 23 *supra.*

also be abandoned because of the MFJ's prohibition on interLATA routing by the operating companies.

48. In describing how network planning will be affected by the divestiture, applicants state that "the scope of each entity's planning will be confined to the portion of the network [that] it owns or directly controls."[58] With the exception of planning for shared multifunction facilities, for which the short term requirements of the lessee will be taken into account, applicants state that AT&T and operating company planning interaction will be the same as the interaction between the operating company and other interexchange carriers. This interaction would consist primarily of the provision by the interexchange carriers of demand forecasts for exchange access and the transmittal by the operating companies of interface requirements.

D. *Plans for Meeting the Equal Access Requirements*

49. As Exhibit 14 to the consolidated application, applicants submitted a 14 page document entitled "Current Planning for Equal Access." The document had been filed with the court on December 16, 1982, as an attachment to AT&T's memorandum in support of its motion to approve the Plan of Reorganization. The document states that there are three ways in which access may be provided depending upon operating company and interexchange carrier needs: 1) direct trunk connections from the interexchange carrier's Point of Presence to operating company end offices within the LATA, 2) connections via an access tandem switching system,[59] or 3) a combination of direct trunking and access tandem connections. Exhibit 14 also states that full equal access capabilities currently are being developed on two switching systems that characteristically serve fewer than 10,000 lines[60] but that for step-by-step systems no economic means of providing equal access have been found at this time. Finally, the document states that the design loss, noise, and echo return loss standards, and the probability of blocking will be the same for the three different access configurations.

E. *National Security and Emergency Preparedness*

50. The final set of questions contained in our January 14 letter

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[58] Consolidated Application at 64.

[59] Applicants explain that the "Access Tandem switching system will provide a point within a LATA for concentrating and distributing the traffic of interexchange carriers, including AT&T, when direct connections to each end office in the LATA from each interexchange carrier's POP would not otherwise be justified economically." Consolidated Application, Exhibit 14 at 3.

[60] Section A3 of Appendix B of the MFJ provides that a BOC will not be required to provide equal access to offices served by switches that characteristically serve fewer than 10,000 access lines if the BOC can show that it is not physically feasible except at extraordinary cost.

related to how national security and emergency preparedness (NSEP) requirements would be fulfilled after the divestiture. The Plan of Reorganization provides that AT&T will retain the government communications organization that currently provides the NSEP point of contact for the entire Bell System. To meet the requirement in Section I(B) of the MFJ for a single point of contact among the operating companies for NSEP needs, a specialized government communications group will be established within the Central Staff Organization to coordinate NSEP planning and implementation between the operating companies and the government.[61] If requested by the government, the group also might act as the point of contact for other carriers to coordinate operating company NSEP services that are interconnected with services by interexchange carriers. The government group may not, however, select interexchange carriers nor would there be a prohibition against the government dealing directly with a particular operating company or interexchange carrier should it decide to do so.

IV. *PLEADINGS AND ADDITIONAL INFORMATION*

51. Thirteen parties filed comments or petitions relating to the consolidated application.[62] Although in general the comments and petitions were brief, the issues raised in these pleadings cover a wide range of subjects. Several parties raised concerns regarding the costs of divestiture, including arguments that the cost information supplied by AT&T was not sufficient, that the Commission should request further information, and that AT&T shareholders should bear all divestiture-related costs. Equal access issues also were raised with commenters arguing that the information supplied by AT&T was not complete, that equal access would not be provided, and that equal access could be provided most efficiently by direct OCC connection at a Class 4 office. Several conditions designed to ensure equal access also were proposed.

52. Several parties raised issues regarding the facilities and assets to be transferred. These included the contentions that not enough information had been supplied to determine whether the

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[61] *See* para. 29 *supra* and para. 161 *infra*.

[62] These were: the Associated Press and SATellite Data NETworks, Inc. (AP/SATNET) (Comments); the Federal Executive Agencies (FEA) (Comments); the International Communications Association (ICA) (Comments); the City of New York (Notice of Appearance); the Tele-Communications Association (TCA) (Comments); Midwestern Relay Company (MRC) (Comments); Southern Pacific Communications Co. (SPCC) (Comments); the Independent Data Communications Manufacturers Association, Inc. (IDCMA) (Comments); GTE Service Corporation (GTE) (Petition to Deny); MCI Telecommunications Corp. (MCI) (Comments); Satellite Business Systems (SBS) (Petition to Investigate and Impose Conditions); the staff of the Michigan Public Service Commission (Michigan) (Comments); New York State Public Service Commission (Comments).

lines being transferred are the proper ones, that "backbone" facilities and certain radio facilities may have been improperly assigned, and that certain provisions in the Plan of Reorganization could deprive the operating companies of facilities needed to provide equal access or unreasonably increase the operating companies' revenue requirements for exchange access while lowering those of AT&T. Another facility-related matter raised involved the post-divestiture sharing of multifunction conduit. Midwestern Relay Co. proposed that AT&T and the operating companies be required to tariff their conduit sharing arrangements and make these tariffed offerings available to other carriers. Finally, several concerns were raised regarding national security and emergency preparedness responsibility and capability.

53. AT&T replied to these pleadings and eight parties filed additional comments in response to AT&T.[63] A summary of all the pleadings and AT&T's replies is contained in Appendix A.

54. After initial review of the application and the comments received, the Common Carrier Bureau, on July 8, 1983, sent a letter to AT&T requesting answers to additional questions on the impact of the divestiture upon ratepayers in terms of rates and quality of local and toll service. With respect to changes in the network and their impact on rates and services, the letter asked for additional information on the sharing of multifunction facilities, and the effect of an FCC requirement to tariff the use of conduit, the impact of divestiture on routing of traffic, and the impact of the failure of switching systems after divestiture. The letter also requested a more detailed analysis of the costs of divestiture. For example, because the cost figures submitted in the application showed that projected costs for 1987 would still be significant and there was no indication of when the costs might taper off, the letter requested information relating to costs that might be incurred after 1987. In addition, the Bureau requested estimates of divestiture-related administrative and legal costs, the costs of eliminating sharing arrangements, and the costs of any change in the company's cost of debt and equity.

55. The Bureau also asked for information on the impact that the divestiture-related costs will have on ratepayers. It noted that there had been a substantial number of rate increase requests filed with State Commissions in the preceeding months and requested an analysis of which of the costs supporting the rate increases were attributable to the divestiture. An estimate of the average monthly increase in local telephone rates also was requested.

56. The letter also noted that the estimate in Exhibit 9 of the application of $6.38 billion in net plant being transferred to the IXC subsidiaries seemed small when compared to the total operating

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[63] These were: MCI, SBS, FEA, SPCC, IDCMA, the Nebraska Public Service Commission, GTE, and the Florida Public Service Commission.

company toll service revenues of $28.64 billion in 1982. At the same time, the Bureau recognized that the operating companies would still be getting substantial revenues from intraLATA toll, access charges and lease of equipment. Nevertheless, in order to evaluate better the transfers, the Bureau asked for estimates of post-divestiture operating company intraLATA toll revenues, access charge revenues, and revenues from leases of shared plant. In addition, AT&T was asked to estimate the impact of the changes on the AT&T and operating company rates of return.

57. In response to the Bureau's letter, applicants submitted answers to some of the questions and explained that certain other material was either not then available or too difficult to predict. On the technical and facilities aspects of divestiture, applicants submitted a listing of each facility identified at that time that will be subject to a sharing agreement between AT&T and the operating companies. The listing includes the owner of the facility, the type of facility and its location and shows that, at least immediately after divestiture, a substantial number of facilities will be shared.[64]

58. In response to the Bureau's questions on post-divestiture routing of traffic in the event of switching system failures, applicants stated that "failure recovery plans" would continue to be developed "by both the BOCs and AT&T and, presumably, similar efforts will be conducted by all interexchange carriers and independent companies."[65] Applicants noted that in those LATAs where an interexchange carrier had multiple POPs, the BOCs will reroute traffic from the failed switch to a surviving POP. In those LATAs in which an interexchange carrier has only one POP, applicants contemplate that the end user will be required to select an alternate interexchange carrier. When a failure involves facilities used as a backup by a government agency that performs national security and emergency preparedness functions, applicants note that there are a number of ways in which the NSEP capabilities may be preserved, including various priority schemes and rerouting to other carriers.

59. Applicants did not respond to the Bureau's questions on the effect of a Commission requirement to publish tariffs for the use of conduit or pole lines by other carriers. Rather, they argued that under Section 224 of the Communications Act the Commission does not have jurisdiction over the rates and terms for pole attachments and use of conduit when such matters are regulated by the states and that a Commission requirement to publish such tariffs might conflict with the Act. Moreover, applicants state that there is no

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[64] When applicants submitted the list, they estimated that only 75% of the facilities to be shared had been identified at that time. AT&T filed a supplemented list on October 7, 1983. The listings submitted show that there will be approximately 16,000 contracts for shared facilities.

[65] AT&T Response at 13 (July 29, 1983).

need for the Commission to assert jurisdiction over these facilities to require their tariffing. Finally, applicants state that AT&T has no current plans to use the conduit it will own after divestiture to build local facilities.

60. With respect to the costs of divestiture and the effects of those costs on ratepayers, applicants submitted additional information only in the area of administrative and legal costs, claiming that other costs requested in the Bureau's letter were either unavailable or had already been submitted.[66] Applicants stated that it was difficult to separate divestiture-related administrative and legal costs from non-divestiture related costs, but they were able to identify approximately $19 million already expended primarily for billings for outside accountant, investment banking and similar services. In response to a question on the elimination of sharing agreements, applicants reiterated that no estimate of those costs could be given but that such agreements would be "phased out principally as part of the normal growth and modernization of the BOC and AT&T networks."[67]

61. AT&T's response to the Bureau's request for additional information on the impact of divestiture-related costs on ratepayers was only slightly more specific than its original submission.[68] It estimated that of the total amounts identified in the consolidated application as divestiture-related costs, AT&T is expected to incur about $153 million in capital investment (or approximately 81% of the total), $53 million in network expenses (or approximately 59% of the total) and $105 million in equal-access related expenses (or 9% of the total). The balance will be incurred by the BOCs. Applicants state that to the extent AT&T incurs costs in order to provide intraLATA functions for the BOCs, the costs will be recovered from the operating companies through contract charges and that the balance will be recovered through AT&T interLATA charges. No

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[66] For example, with respect to the request for divestiture-related costs that may occur between 1988 and 1992, AT&T stated that the "cost estimates set forth in the Consolidated Application assumed that all divestiture and equal access costs would be incurred by the end of 1987 even though the actual incurrence of these costs may extend beyond 1987. Accordingly, in its March 1 submission, AT&T included as part of the costs for the 1983-1987 period its estimates of costs that may actually be incurred subsequent to 1987 . . . . In any event, AT&T estimates that the vast bulk of MFJ-related costs for the network will in fact be incurred prior to [1988]." *Id.* at 37-38. With respect to the effect of divestiture on the costs of debt and equity, applicants acknowledged that there may be an effect but that it was not possible to quantify the effect.

[67] *Id.* at 27.

[68] In response to the Bureau's request for estimates of post-divestiture operating company intraLATA toll revenues, access charge revenues, and revenues from leases of shared plant, applicants stated that estimates could only be provided for the revenues from leases of shared plant, which will be approximately $1.4 billion in 1984 for the leases identified at that time.

estimate is given, however, of the amounts to be recovered from the two sources.

62. To the Bureau's observation that a number of state tariff filings suggest that the costs of divestiture may be somewhat greater than are shown in the consolidated application, applicants responded that its review of the state filings did not support such a conclusion:

> Rather, the filings reflect the fact that a variety of factors— unrelated to divestiture—are causing local rates to rise; among these factors are the pervasiveness of competition which tends to drive prices toward costs, changing demand patterns, advancing technology, inflationary price and wage increases, faster capital recovery, changes in jurisdictional separations procedures, and the expansion of local networks . . . .
>
> It is AT&T's view . . . . that divestiture as such will have little or no impact on local rates. The vast bulk of the costs identified in the Application are for providing improved exchange access . . . . These costs will be recovered in access charges to interexchange carriers.[69]

63. On August 1, 1983, the Commission issued a Public Notice requesting comment on the additional information filed by AT&T.[70] Nine parties filed comments in response to the notice.[71] Briefly, the comments included arguments that the cost information provided by AT&T still was not complete, expressed continuing concerns regarding equal access, access to conduit, national security and emergency preparedness functions, and raised new issues involving operating company procurement practices, the assignment of Account 232 ("station handling expenses") and the Shared Network Facilities Agreement. AT&T filed a reply to these comments. These pleadings also are summarized in Appendix A.

64. On September 30, 1983, the Common Carrier Bureau again wrote to AT&T requesting additional information on the costs of divestiture and asking AT&T to comment on a letter from the Bell Operating Companies stating that AT&T had not included certain costs in its previous estimates. AT&T responded to the Bureau's letter on October 14, 1983, by clarifying some of its previous discussion on costs and providing some additional information on the administrative costs of divestiture. Finally, on November 3, 1983, the Bureau wrote to AT&T requesting additional information about the extent to which AT&T plans to own, or lease from the operating

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[69] AT&T's response at 40 (footnotes omitted).

[70] In addition to AT&T's response to the Common Carrier Bureau's letter of July 8, AT&T had filed amendments to the application and supplemental information (including a draft of its Shared Network Facilities Agreement) on four occasions.

[71] These were: the People of the State of California and the Public Utilities Commission of the State of California (California)(Comments); GTE (Supplemental Comments in Support of Petition to Deny); the FEA (Further Comments); the Bell Operating Companies (BOCs)(letter); Stromberg-Carlson Corporation (Stromberg-Carlson) (Comments); IDCMA (Additional Comments); GTE Sprint Communications Corporation (GTE Sprint)(Comments); MRC (Further Comments); and MCI (Comments). SBS filed reply comments on Sept. 9, 1983.

companies other than under tariff, local distribution channels associated with private line services. AT&T responded to the letter on November 14, 1983, stating that AT&T will not retain ownership in Bell System facilities going to customer premises, except in a few very limited instances, and will not lease facilities between AT&T's serving offices and the customer premises from the operating companies, except under tariff.

V. *DISCUSSION*

A. *Scope of this Proceeding*

65. The application before us has been filed pursuant to Sections 214 and 310 of the Communications Act, 47 U.S.C. §§214, 310. Under Section 214, this Commission may not grant an application to transfer lines unless it finds that the present or future public convenience and necessity will be satisfied by the transfer. Nor can it grant an application for discontinuance of service[72] unless it finds that neither the present nor future public convenience and necessity will be adversely affected thereby. Similarly, Section 310(d) provides that no construction permit or station license may be transferred unless the Commission finds that the public interest, convenience, and necessity will be served thereby. Observers may debate for many years the degree to which the benefits actually realized from divestiture will approach those forecasted by its proponents. Clearly, the record required for this agency to have ordered divestiture would be much more substantial than has been presented here. However, the record necessary to review a voluntary carrier reorganization may be less comprehensive. We believe that under the circumstances present here we do have a sufficient record to make the necessary statutory findings.

66. The first issue to be addressed relates to the scope of this proceeding. The commenters have raised numerous objections to the application. AT&T's response, primarily, is that the majority of the issues raised by the commenters are beyond the scope of this

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[72] Although AT&T requests Section 214 authorization relating to discontinuance of service, it takes the position that no discontinuance is, in fact, involved since uninterrupted service will be continued to all communities presently served by the Bell system. We believe, however, that there will be a discontinuance since both AT&T and the operating companies will cease to provide service they presently provide. After divestiture, AT&T will no longer control the exchange functions used to provide the end-to-end service it currently offers—the operating companies will be providing the exchange portion of such service. The operating companies will no longer own any interexchange facilities or provide interexchange service. Because the same entities will no longer be providing the same service provided before divestiture, discontinuance authority is necessary. We note that AT&T and the BOCs have traditionally filed Section 214 discontinuance applications when lines are transferred from one operating company to another. *See, e.g.*, In re Mountain States Telephone and Telegraph Co. (W-P-D-203), FCC 81T-4, released Jan. 8, 1982.

proceeding. According to AT&T, the Commission merely should review whether the particular transfers satisfy the public interest standard of the Communications Act and not review the details of the implementation of the Consent Decree.[73] In response, several commenters argue that the issues raised in the comments cannot and should not be separated from the ultimate decision in this case on the facilities transfers[74] and that this Commission should not look at its role in this proceeding as merely ministerial.

67. To the extent that it suggests that our interest in this matter is narrow or limited, we disagree with AT&T's view of our responsibility in this proceeding. The public interest standard of Sections 214 and 310 is broad. The courts have held that the Section 214 standard should be construed to secure for the public the broad aims of the Communications Act as established in Section 1 of the Act.[75] Section 1 provides that this Commission was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communication."

68. In determining whether the acquisition of a carrier's facilities or a transfer is in the public interest the Commission has considered a broad range of factors relating to the Section 1 interests in prior cases. These have included, *inter alia*: the competitive impace of the transaction,[76] the impact on the ratepayers of the carriers involved,[77] whether services would continue to be available to the public in a satisfactory manner,[78] the financial viability of the acquiring carrier,[79] and the transferee's legal, technical and finan-

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[73] Although the test for grant of Section 214 and Section 310(d) applications is stated in slightly different terms ("public convenience and necessity" and "public interest, convenience and necessity") neither the courts nor this Commission appear to have placed any significance upon the different language and many cases use the terminology interchangeably. *See, e.g.*, Pocket Phone Broadcast Service, Inc. v. FCC, 538 F.2d 447 (D.C. Cir. 1976).

[74] *See, e.g.*, Reply Comments of MCI at 3; Final Comments of SPCC at 5; Final Comments of SBS at 2.

[75] *See, e.g.*, Telegraphers Union v. United States, 87 F.Supp. 324 (D.D.C.), *aff'd per curiam*, 338 U.S. 864 (1949).

[76] *See, e.g.*, GTE Corp. (SPCC acquisition), FCC 83-269 (released July 1, 1983); General Telephone and Electronics Corp. (GTE-Telenet Merger), 70 FCC 2d 2249, *recon. denied*, 72 FCC 2d 91 (1979); Application for Transfer of Control (Tymshare-Microband Transfer), File Nos. 11-76-CM-TC-(69)-80 (released Dec. 24, 1980).

[77] *See, e.g.*, GTE Corp., *supra* note 76.

[78] *See, e.g.*, ITT World Communications, Inc., 21 FCC 2d 426 (1970).

[79] *See, e.g.*, American Communications & Electronics Corp., 49 FCC 2d 1053 (1974); GTE Corp., *supra*.

cial qualifications to be a Commission licensee.[80]

69. The application before us seeks to implement the largest corporate reorganization in history, which will change the manner in which telecommunications services have been made available to the American public for most of this century. For this Commission to fail to consider any major issue relating to whether rapid, efficient communications services with adequate facilities at reasonable charges will continue to be provided after the proposed divestiture would be an abrogation of our responsibilities. Likewise, we must look at the impact of the planned divestiture upon the national defense and safety of life and property. In the case of the application before us, it is clear that the major provisions of the Consent Decree and the manner in which it is to be implemented bear on the broad public interest question.[81]

70. It is also clear that this Commission's review of the applications and effects of divestiture must be independent of the District Court's review of the MFJ. While the antitrust court, as a court in equity, can examine collateral effects of a proposed consent decree, its primary emphasis must be in analyzing the competitive effects of the divestiture. While we believe it is appropriate to give weight to the District Court's findings relating to the effects of divestiture on competition, we have the responsibility to make our own public interest findings. In doing so, our primary concern, of course, is not that competition be stimulated for its own sake but that the effects of the proposed divestiture be, on balance, beneficial to consumers and promote the national security.[82]

71. At the same time, in order to determine whether the transfers are in the public interest, this Commission need not determine whether each provision of the Plan of Reorganization or the establishment of each LATA is in the public interest. Nor must we, for example, decide every interconnection or rate issue raised by the parties. Rather, this Commission must decide whether, on balance, the implementation of the Consent Decree, as proposed by the parties, and the facilities transfers associated therewith, is in the public interest and will further the objectives of Section 1 of the Communications Act. In making such a determination, the Commission's options are not limited to granting or denying the application. Section 214(c), for example, expressly grants authority to deny, grant in whole or in part, or "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and

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[80] *See, e.g.*, Tymshare-Microband, *supra*, note 76.

[81] As noted above, we have previously made it clear that this Commission would examine the effects of the divestiture upon rates and the quality of service. *See, e.g.*, Brief for FCC as Amicus Curiae, Civ. Action No. 74–1698, at 7 (April 20, 1982).

[82] *See* United States v. FCC, 652 F.2d 72, 106-07 (D.C. Cir. 1980).

necessity may require." Similarly, Section 303(r), relating to radio facilities, provides that the Commission may "prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Communications Act] . . . ." In this proceeding it is appropriate to consider all pertinent issues raised to determine whether the Commission's broad authority to impose conditions ought to be employed should public interest considerations require grant of the application.[83]

B. *Competitive and Other Impacts of Divestiture*

72. In the following section, we discuss the competitive and other impacts that we foresee emerging from the MFJ. We note, initially, that almost all the commenters have expressed the opinion that the divestiture of the Bell Operating Companies from AT&T is in the public interest because it will encourage competition in the various service and equipment markets.[84] These views are consistent with the findings of the district court and the observations of the Department of Justice.[85] We are cognizant of the fact that these views are based, in part, upon economic theory and that it is impossible to predict or quantify with certainty the benefits that may come from divestiture. We also are cognizant of the fact that these views are, for the most part, those of various competitors of AT&T and not those of the end users of AT&T's services. Nonethe-

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[83] In its reply, AT&T contends that the Commission may not properly impose conditions in this proceeding. First, citing MCI v. FCC (Execunet I), 561 F.2d 365, 379 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), AT&T argues that "there [has not been] sufficient notice to the applicants that the Commission is considering the imposition of any particular condition nor has there been presentation of adequate evidence to justify any of the proposed conditions." Second, AT&T argues that the Commission's power to impose such conditions is limited because the transfers are not voluntary but are mandated by a court-ordered decree. Reply Comments of AT&T at 26 n.*.

AT&T's view of the Commission's conditioning power is too narrow. First, there is no suggestion in Section 214 that any particular kind of notice be given to the applicant or that "involuntary" transfers are subject to a different public interest determination than are voluntary transfers. Second, precedent fully supports the Commission's broad power to impose conditions on facilities authorizations provided the requisite public interest determination has been made. *See, e.g.*, AT&T (Northeast Corridor Lightguide application), 84 FCC 2d 303 (1981). GTE-Telenet Merger, 72 FCC 2d 111 (1979); United Video, Inc., 69 FCC 2d 1629 (1978). In each of these cases conditions were imposed on facilities authorizations under Section 214 without prior notice to the grantees. *MCI v. FCC* is not to the contrary. Nowhere does the court in MCI even entertain the notion that notice is necessary before conditions can be imposed; it simply held that before conditions may be imposed the Commission must affirmatively determine that such restrictions are required by the public convenience and necessity. 561 F.2d at 379. In this case, we find that the public convenience and necessity requires the conditions we adopt.

[84] *See, e.g.*, MCI Comments to AT&T Response of July 29, 1983, at 1.

[85] *See* 552 F.Supp. at 165, 174; Department of Justice Competitive Impact Statement, 47 Fed. Reg. 7170, 7173-80 (1982).

less, our best analysis is that competition in these markets is likely to increase as a result of divestiture, leading to generally lower prices for ratepayers, greater technological advances, an increase in the type and number of services available, and an industry structure that is more responsive to consumer needs.[86]

1. *Interexchange Telecommunications Services*

73. The principal provisions of the MFJ that will affect competition in interexchange telecommunications services are those that require the separation and divestiture of the exchange and exchange access functions from the interexchange functions, the provisions relating to equal access for all interexchange carriers, the requirement that access be provided under unbundled cost-justified tariffs, and the prohibition against the operating companies providing interLATA service.[87] Divestiture should remove AT&T's ability, through its ownership of the operating companies, to control the access of its competitors to the local exchange and reduces the incentives of the operating companies to discriminate against any interexchange carrier in the provision of exchange access.[88] In addition, the requirement that the operating companies offer access under cost-based tariffs provides a check against price discrimination in the provision of exchange access services. The equal access requirement also provides an enforcement mechanism for carriers who may be the object of discrimination. We conclude that if these provisions are implemented in accordance with the terms of the MFJ it is likely that they will stimulate interexchange competition, because existing and new interexchange carriers will be able to provide interexchange services knowing that they will have the same access to the "bottleneck" exchange facilities as any other interexchange carrier. Increased competition should provide benefits to ratepayers and these effects are consistent with prior Commission decisions and objectives.[89]

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[86] As noted *infra* at paras. 135-141, we foresee the possibility of some technical difficulties and consequent service difficulties in the post-divestiture environment. Nonetheless, we believe these problems can be solved by cooperation among carriers and by appropriate Commission action.

[87] *See* Parts I, II and Appendix B of the Decree. The operating companies also may not discriminate in the establishment and dissemination of interconnection standards and the planning for exchange access facilities.

[88] Because the operating companies may be competing with other carriers in the provision of intraLATA service, it cannot be said that the operating companies have no incentive to discriminate. At the same time, the operating companies should have no structural reason to prefer one interexchange carrier over another in the provision of exchange access services.

[89] *See, e.g.*, Specialized Common Carriers, 29 F.C.C. 2d 870 (1971), *aff'd sub nom.* Washington Util. & Trans. Comm'n. v. FCC, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1981).

74. One of the most controversial issues facing the telecommunications industry since the inception of interexchange competition has been that of the interconnection to be provided by the local companies to other common carriers (OCCs)[90] for origination and termination of calls.[91] Very generally, the OCCs have complained that the interconnection they receive is unreasonably discriminatory and inferior to that provided to AT&T.[92] The OCCs have noted, for example, that: 1) their interexchange facilities have not been available from rotary-dial telephones, absent connection of a tone signalling device to the telephone, 2) that OCC customers normally have been required to dial 22 or 24 digits while customers of AT&T have been required to dial only 10 or 11 digits, and 3) that OCCs have not been able to obtain certain billing and other information from the local operating companies.[93] AT&T, on the other hand, consistently has argued that the OCCs have had an artificial competitive advantage over AT&T because they have paid substantially less than AT&T for the use of exchange facilities.[94]

75. We have recently adopted an "access charge" order designed, in part, to eliminate any discrimination in the compensation paid for use of exchange plant to complete interstate service offerings and tariffs have recently been filed to implement that order.[95] We expect that our access charge order, and the tariffs filed pursuant thereto, ultimately will eliminate most of the discrimination in the traditional methods by which local companies are compensated for exchange

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[90] The OCCs provide terrestrial voice and data services in direct competition with established telephone companies.

[91] OCCs like MCI, GTE Sprint, and United States Transmission Systems construct interexchange facilities, traditionally point-to-point microwave, between cities. In order to originate and terminate calls these carriers use the local distribution facilities of the Bell Operating and independent telephone companies.

[92] *See, e.g.*, Comments of MCI in CC Dkt. 78–72 (Aug. 15, 1980).

[93] *Id.*

[94] For the past four and one-half years, the OCCs have been compensating the operating companies for use of local distribution facilities in connection with the OCC's provision of MTS/WATS-type services under the "ENFIA" tariff, Bell System Operating Companies Tariff F.C.C. No. 8. That tariff resulted from public negotiations among the OCCs, AT&T and GTE Service Corp. *See* Exchange Network Facilities for Interstate Access (ENFIA), 71 FCC 2d 440 (1979). AT&T, on the other hand, has compensated local telephone companies through the "settlements" and "division of revenues" process. AT&T has claimed that the compensation it pays to the local companies for use of non-traffic sensitive plant (primarily the local loop) is about double what the OCCs pay. *See* MCI Telecommunications Corp. v. FCC, 712 F.2d 517 (D.C. Cir. 1983). For a thorough discussion of the differences between these two methods of compensation, see the Second and Fourth Supplemental Notices in CC Dkt No. 78-72, 77 FCC 2d 224 (1980), and 90 FCC 2d 135 (1982).

[95] *See* Third Report and Order in CC Docket No. 78–72, FCC 82–579, released Feb. 28, 1983, *reconsideration*, FCC 83–356, released Aug. 22, 1983. In that order we did, of course, recognize that AT&T continues to obtain access that is superior to that provided to the OCCs. We attempted to mitigate the effects of this difference through a premium access charge to be levied on AT&T.

access. To the extent that the MFJ eliminates structural incentives to discriminate against certain carriers in the provision of exchange access for interLATA service, we find that it complements our access charge order and should increase competition in the interexchange market.

76. With respect to the technical manner in which interconnection is provided, this Commission also has spent considerable resources in attempting to find a more equitable means by which other common carriers can connect with local companies. For example, Commission staff participated in a series of meetings in 1980 and 1981 to attempt to resolve the differences between AT&T and the OCCs. While we have never ordered that the operating companies provide "equal access" we have been concerned about the differences in the manner in which interconnection was provided to AT&T and the OCCs and have sought to eliminate them.[96] The MFJ seeks to eliminate those differences in access provided by the Bell Operating Companies by mandating that all carriers be offered access equal in terms of price, quality and type to that offered to AT&T. Thus, if the operating companies comply with the provisions of the MFJ, after the period allowed for the implementation of the equal access provisions there should be no distinction between AT&T and the other common carriers in terms of access from rotary dial versus tone dialing telephones, billing information or the number of digits dialed in the majority of cases.[97] As with the payments for access to the local exchange, we believe that the elimination of these differences will increase competition and will be in the public interest if it is accomplished without unnecessary expenditures.

77. We have often repeated the benefits that we believe will flow from competition in telecommunications services.[98] Most recently, in the Report and Third Supplemental Notice in the *MTS and WATS Market Structure*,[99] we stated our belief that, with respect to MTS and WATS-type services, competition was in the public interest because it "is more likely to result in an efficient allocation of resources than a monopoly industry structure."[100] In particular, we found that marketplace pressures create an incentive to engage in

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[96] We note that we have recently instituted a rulemaking to address the interconnection obligations of the independent telephone companies. MTS and WATS Market Structure, Phase III, FCC 83–178, released May 31, 1983.

[97] *See* note 60 *supra*. Complete equality in the number of digits to be dialed for additional carriers is not required under the Decree until such time as the national numbering plan is revised.

[98] *See. e.g.*, Specialized Common Carrier Services, note 89 *supra*. Customer Interconnection No. (Docket No. 20003), 61 FCC 2d 766 (1976); Competitive Carrier Rulemaking, 85 FCC 2d 1 (1980), 91 FCC 2d 59 (1982), *recon.* FCC 83–69 (released March 21, 1983).

[99] 81 FCC 2d 177 (1980).

[100] *Id.* at 185.

accurate forecasting that is not present in a monopoly environment.[101] Accurate forecasting and investment decisions based on such forecasts should lead, in turn, to lower rates for ratepayers because they will not be required to pay for underutilized facilities. In addition, we believe that competition has encouraged carriers to offer a greater variety of services to the public.[102] Thus, the purpose of Sections 1 and 214 of the Communications Act, 47 U.S.C. §§1, 214, to make available to the people of the United States rapid efficient service at reasonable rates is likely to be fostered by the MFJ.

78. While generally expressing agreement with the equal access provisions of the MFJ and stating that they should increase competition in the interexchange markets, several commenters have complained about the current planning for equal access. Very generally, the comments allege that AT&T and the BOCs have provided insufficient information on the manner in which equal access will be provided and that what information there is shows that the access to provided will not, in fact, be equal. Several of the commenters urge that access for all carriers always should be provided by direct connection at a Class 4 office. In addition, certain commenters have asked this Commission to place several access-related conditions upon the grant of the application.[103]

79. AT&T and the operating companies have provided this Commission with several documents relating to the operating company plans to provide equal access and have included estimates

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[101] At the same time, we recognize that forecasting may be more complicated for all carriers in the future.

[102] For example, in the data, packet switching and satellite areas, we believe that, in addition to other factors, the number of entrants into these fields has had a positive effect on the rate of innovation and has led to a variety of services being offered more quickly than they otherwise would have been. *See, e.g.*, Assignment of Orbital Locations, 84 FCC2d 584, 586–89 (1981) (description of the development of domestic satellite services).

[103] The comments request that we condition the grant of the application upon:

1) the outcome of an investigation into equal access matters;
2) each BOC providing by September 1, 1986, equal access to all of its end offices, unless such end office is exempted from such a requirement by the court;
3) equal access being offered in any such exempted office by the time the premium access charge imposed upon AT&T is eliminated;
4) each BOC filing with the Commission information on the standards of interconnection presently provided to AT&T, detailed plans for accomplishing equal access, and reports on progress made;
5) AT&T transfering to the operating companies sufficient facilities and personnel to permit each operating company to perform, independently of AT&T, exchange and exchange access functions;
6) each operating company filing a just and reasonable access charge tariff; and
7) the continued offering of the present level of interconnection to the OCCs.

of the costs of providing such access. As noted above, exhibit 14 to the consolidated application briefly describes the three methods by which access will be provided to carriers: 1) direct trunk connections from the interexchange carrier's point of presence to the operating company's end office, 2) connections via an access tandem switching system, and 3) a combination of direct trunk connections and connections via an access tandem. In that exhibit, applicants also claim that the design loss, noise and echo return loss standards[104] and the probability of blocking under both the direct trunk and access tandem options will be the same.[105]

80. In response to the commenters' allegations that the information submitted was insufficient and showed that "equal" access was not in fact contemplated, AT&T submitted an updated version of its plans regarding equal access in its May 5, 1983 reply. AT&T argues that the BOCs must be given flexibility in deciding how access will be provided and that the use of a Class 4 switch for interconnection is not always economical or preferable. Although apparently conceding that there may be some difference in the performance standards of the various methods of providing interconnection, according to AT&T these differences "will be negligible and imperceptible to customers."[106]

81. Although we have concluded that if all carriers are provided access equal to the access provided to AT&T as required by the Consent Decree competition in interexchange telecommunications services is likely to increase, we do not have sufficient information on the means by which access will be provided to determine whether the intended effect of increased competition in fact will occur. Additionally, after consideration of all the pleadings and of the information currently available from AT&T, we have some concerns that the access that the BOCs plan to provide may result in unnecessary expenditures. Although in principle we agree with AT&T that the operating companies should be given flexibility in deciding how access will be provided, and although we are not

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[104] The design loss standard specifies how much lower the signal power is expected to be at the end of a trunk as compared to the beginning of the trunk. Consolidated Application, Exhibit 14 at 5. The design loss standard will be 3 dB. The noise standard quantifies the amount of background noise on a trunk that a caller may perceive. *Id.* at 6. The noise standard will vary depending upon the route mileage between the end office and the POP. Finally, the echo return loss is "a measure of the transmission loss that a signal encounters from a given point on the transmission path to the point or points of reflection (which causes the echo) and back." *Id.* at 7.

[105] *Id.* at 7–8.

[106] In support thereof, AT&T cites a study conducted by Bell Labs that apparently showed that customers perceive a statistically insignificant difference in the quality of service provided over the various means of interconnection (direct trunk or tandem) being proposed. Reply Comments of AT&T, Attachment A at 13–16.

convinced at this time that access should always be provided through a Class 4 switch as requested by some OCCs, we are concerned that the operating companies may construct access tandems unnecessarily. We also recognize that the operating companies have not finalized their plans and may change them prior to submitting them to the Department of Justice in 1984. In light of this, we believe that it is important that we study this matter further and require the submission of certain additional information from the regional holding companies.

82. At the same time, we have concluded that these concerns provide no reason to postpone the planned implementation of the MFJ. As is discussed more fully below, we believe that should the divestiture be implemented as planned, the operating companies will be sufficiently strong to satisfy their intraLATA service and equal access obligations. We do not foresee this Commission taking action related to the provision of equal access that would overly burden the operating companies. Any action we may take will occur before the operating companies have taken substantial steps to implement their plans. Moreover, we do not foresee this Commission requiring expenditures significantly greater than those currently contemplated. In fact, the alternate methods requested by most of the commenters may be less costly to provide than the methods proposed by the operating companies. Thus, despite the fact that there may be unresolved problems relating to the manner in which access will be provided, we conclude that those problems are not so great as to require a postponement of the divestiture.

83. In light of our concerns, we will condition the grant of this application upon the regional holding companies submitting the following information to this Commission:

1) Each company shall file simultaneously with this Commission copies of the equal access plans required to be filed by its operating companies with the Department of Justice pursuant to Section II(C) of the MFJ. Each company shall also file estimates of all the costs of implementing the plans, the costs of implementing any other plan considered and an analysis of why the plan was chosen. With respect to any new facility to be used for the provision of equal access, each company shall also state whether the facility will be used for any other purpose, describe the other purpose and give an estimate of the percentage of capacity of the facility that will be used for equal access purposes.

2) At the time it files the information requested immediately above, each company shall file information on the standards of interconnection provided to AT&T by its operating companies at that time.

3) Each regional company shall file until further order semi-annual reports on January 1 and July 1 of each year (beginning in 1985) on the progress made in providing equal access, including a detailed analysis of the number, location and type of offices from which equal interconnection is available, and the costs actually incurred to plan and implement equal access. In addition, the reports also shall describe any changes made in previous plans submitted to this Commission, the cost differential between any revised plan and any previous

plan(s), the reasons for changing the plan(s), and a list of the offices for which an exception to the equal access provisions of the MFJ has been filed with the court.

At this time, we will not establish specific accounts to be used to record the costs of equal access. Nonetheless, we will require the companies to maintain underlying records in such detail that the specific costs incurred to provide equal access are readily identifiable.

84. When this information is submitted, we will consider whether further action on our part is required. Although we will not now begin a formal investigation into the operating companies' plans, we may choose to do so in the future. We believe the information we are requiring will assist us in considering the tariffs that will be filed in the future. Since we are not initiating a proceeding at this time, we reject SBS' request that we condition the grant of the consolidated application upon the outcome of an investigation. In addition, because the operating companies' plans for providing equal access still are unsettled, and likely will vary among the companies, and because we do not have full information on the access to be provided or the costs involved, we cannot at this time adopt conditions ordering particular kinds of access.[107]

85. We also do not believe that it would serve any purpose to condition the application, as requested by MCI, upon the operating companies complying with the various equal access requirements of the MFJ. We have sufficient authority under Title II of the Communications Act to order such interconnection as we may find desirable and in the public interest. *See, e.g.*, 47 U.S.C. §201. We also reject MCI's request to condition the application upon every end office offering equal access by the time the premium access charge is eliminated. This issue is being considered in Phase I of CC Docket No. 78–072, MTS and WATS Market Structure, and thus need not be considered here.[108] Finally, we see no reason to condition the application upon each operating company filing a just and reasonable access charge tariff. The operating companies have recently

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[107] Thus, we will defer resolution of SBS' suggestion that specific transmission parameters for equal access be adopted and MCI's proposal that a "benchmark" interconnection standard be established. With respect to MCI's request that we condition the application upon the operating companies continuing to provide the present level of interconnection to the OCCs, we find no basis for imposing such a condition. We note that Appendix B of the MFJ appears to require the operating companies to provide interconnection different from AT&T's upon reasonable request.

[108] *See* FCC 83–386 at para. 107 (released Aug. 22, 1983). *See also* note 95 *supra*.

filed new access charges with this Commission and we are currently reviewing them.[109] Such a condition would be redundant in light of our responsibility under Sections 201–205 of the Communications Act, 47 U.S.C. §§201–205, to assure that all rates and practices are just and reasonable and to take whatever remedial action may be necessary to achieve this end.

86. In addition to the comments relating to equal access to exchange facilities, one commenter raised concerns about access to AT&T's network. In its comments SBS states that AT&T's dominant position in the intercity market makes it imperative that other carriers have access to its network and requests that we condition grant of the application upon AT&T's provision of reasonable interconnection for OCCs to its interexchange network (including CCIS) or upon the results of an investigation into AT&T's interconnection obligations. AT&T has responded that such matters are outside the scope of this proceeding and that, in any event, the condition is unnecessary. AT&T states that under existing policies competitors already have extensive access to AT&T's network and that SBS' request for CCIS interconnection "represents the antithesis of the competitive objectives [that] this Commission has so diligently pursued."[110] In response SBS notes that CCIS' development was paid for at ratepayers' expense and states its belief that the benefits of CCIS should, therefore, accrue to all consumers.

87. On the basis of the evidence before us, we cannot conclude that the public interest requires the imposition of the condition requested by SBS. First, other carriers currently have extensive rights to interconnect with AT&T's interexchange network. In addition, under Section 201 of the Communications Act we have authority to order interconnection in any case in which we find such action necessary and desirable. While other carriers currently do not interconnect directly with CCIS as it is not a separate service offering, but a means by which AT&T provides signaling for its service offerings, SBS provides us with no basis or reason for ordering that these facilities be offered to other carriers. It has provided no analysis of the number, type and points of CCIS facilities it would require or the cost/benefit trade-off of imposing such a requirement. Moreover, SBS has not demonstrated a sufficient relationship to the transfers of facilities before us to convince us that the issue of CCIS interconnection should be resolved herein. Thus, we are unable to find that the public interest requires conditioning AT&T's current application along the lines proposed by SBS.

88. On a related subject, the manner in which conduit will be

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[109] We recently suspended these tariffs until April 3, 1984, and initiated an investigation into their lawfulness. Investigation of Access and Divestiture Related Tariffs, CC Dkt. 83–1145, FCC 83–470 (Oct. 19, 1983).

[110] Reply of AT&T at 35 n.*.

treated after divestiture was raised by Midwestern Relay Company (MRC) in its comments. Conduit is used to carry network transmission cables from one central office building to another and from central office buildings to customer premises. The Plan of Reorganization provides that conduit, like other facilities, will be assigned according to its function. Because most Bell System conduit primarily serves local telecommunications traffic in metropolitan areas and serves predominantly intraLATA functions, the Plan provides that most of it is being assigned to the operating companies. The few conduit runs that will be used exclusively by AT&T will be owned after divestiture by AT&T. The Plan further provides that conduit that serves both interLATA and intraLATA functions will be shared by AT&T and the operating companies for a period of time after divestiture, pursuant to the proposed Shared Network Facilities Agreement, unless an operating company files tariffs or uniform license agreements that make conduit available to other carriers, in which case AT&T would also obtain use of conduit pursuant to the tariff.

89. MRC objects to AT&T's exclusive right to share conduit pursuant to the Shared Network Facilities agreement and seeks to condition the grant of the application on the operating companies and AT&T making conduit available to all interstate carriers on a nondiscriminatory, tariffed basis.[111] MRC argues that to allow AT&T to share conduit post-divestiture would give AT&T a competitive advantage that divestiture was designed to eliminate. MRC characterizes the access to conduit as an issue of competitive access to a local connecting facility and concludes that the sharing arrangement as proposed in the Plan of Reorganization and AT&T's retention of some local conduit accords preferential access to AT&T to the detriment of MRC and others. MRC contends that the sharing agreement permits AT&T to gain a perpetual right of access to bottleneck facilities and affords it the opportuity to bypass the local network.

90. We have carefully considered MRC's request and find that the record contains insufficient information or reasons to place the condition that MRC requests on the operating companies at this time. Neither MRC nor any other party has thoroughly addressed the factual issues involved in the use of conduit. For example, we have no record evidence of total usable space within the conduit, and no facts on which to base a conclusion that existing conduit could accommodate all future "takers" pursuant to tariff. In fact AT&T claims that the operating companies would be required to build

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[111] Comments of MRC at 8. Other parties, namely SBS and GTE Sprint support MRC's position. Reply Comments of SBS at 2 (Sept. 9, 1983); Comments of GTE Sprint at 7. MRC further requests that AT&T and the operating companies be required to furnish cost support material for the sharing agreements and a report on the purposes for which the shared conduit will be used.

additional facilities were we to grant MRC's request. Moreover, with respect to the AT&T owned local conduit, MRC has not fully addressed AT&T's claim that it is primarily short, single-duct laterals going from BOC conduit to nearby repeater manholes or located in non-metropolitan areas and thus would not be suitable for utilization in the building of local facilities. Accordingly, because we are unable to determine the effect on the operating companies of such a requirement,[112] we are unable to make the legal findings that the condition requested by MRC would satisfy the public interest.[113]

91. GTE Sprint and MCI raise a similar, although broader, concern with multi-function facilities, arguing that the Shared Network Facilities Agreements may provide AT&T with access to operating company-owned facilities at discriminatory rates. To ensure that AT&T is not being given advantageous access to these facilities, GTE Sprint proposes that we require the operating companies to offer to OCCs the same use of facilities leased to AT&T at the same charges or, alternatively, to eliminate any disparity between the lease charges and tariffed rates for similar facilities. GTE Sprint has not provided us with, nor does the record contain, sufficient information to justify imposition of this condition. At this time, we have no information showing that AT&T will be obtaining discriminatory access to operating company facilities. If it becomes necessary in the future, we have sufficient authority under Section 211 of the Communications Act, 47 U.S.C. §211, to require the

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[112] In fact MRC, although generally alleging that it has been unable to use BOC conduit has not indicated how much conduit is involved or where it would like to use such conduit.

[113] FEA raises a somewhat narrower conduit issue. FEA asserts that the combined impact of the Computer II decisions and diverstiture has caused service delays on its military bases and posts when DOD wants to interconnect non-BOC provided customer premises equipment to the existing BOC cable distribution system. FEA suggests that the Commission require the BOCs to provide other carriers or non-affiliated equipment suppliers with reasonable and non-discriminatory access by tariffs or other mechanisms to the on-post conduits or pole line.

This Commission would not countenance the operating companies taking any action that would hinder DOD or any other customer from installing non-operating company-provided CPE. Nonetheless, it does not appear that it is necessary to condition the application as requested by FEA since it appears that these problems can be resolved through the cooperative efforts of the parties. In fact, the applicants represent that on such military bases or posts where DOD, or any other customer, selects a competitor's switching equipment, the BOC will attempt to maximize the value of its existing cable facilities by arrangements such as sale or tariff under which the equipment vendor may continue to use the cable facilities already in place. Reply Comments of AT&T (Sept. 9, 1983) at 6. Given this representation, we expect that the BOCs will take steps to implement a firm policy to deal with such interconnection matters more efficiently post-divestiture. To the extent any of these interconnection problems has national security emergency preparedness implications, we expect that the CSO's government communication group will serve as the point of contact to expedite consideration of DOD's request. Should there be problems in the future, however, we will take appropriate action.

submission of the shared facilities agreements and any other agreements between the carriers.[114] In addition, under Section 201 of the Act, 47 U.S.C. §201, we may require the operating companies to provide facilities to other carriers should we find such a requirement to be in the public interest.

2. *Telecommuncations Equipment Markets*

92. In addition to the separation of the operating companies from AT&T, there are two provisions of the Consent Decree that directly affect the telecommunications equipment market.[115] First, under Section I(A)(3), the standard supply contract between Western Electric and the operating companies will be terminated. Second, Section II(B) prohibits the divested operating companies from discriminating "between AT&T and its affiliates and their products and services and other persons [in the] procurement of products and service [and the] establishment and dissemination of technical information and procurement and interconnection standards."[116]

93. We believe that these provisions are likely to increase competition in the telecommunications equipment market. Both the district court and this Commission have found evidence that AT&T has used its control over the BOCs to encourage them to buy telecommunications equipment from Western Electric for reasons other than price and quality.[117] The divested operating companies will no longer have a structural incentive to buy Western products when the products of other manufacturers are superior or identical in quality but offered at lower prices.[118] Even if there is a lingering prejudice by the operating companies' personnel in favor of Western

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[114] In another matter pertaining to the Shared Facilities Contracts, California contends that AT&T's draft model form of its Shared Network Facilities Agreement mandates a specific ratemaking treatment for expenses and revenues received in connection with shared multi-function facilities being used for intrastate traffic. We disagree with this contention. The model Agreement cannot mandate any such ratemaking treatment; it merely sets forth a methodology for allocating the shared costs and is not binding on this Commission (or any state commission) as to the ratemaking treatment to be given these costs. In addition, we note that the model Agreement was submitted by AT&T as additional background information only and is not deemed approved by grant of the consolidated application.

[115] Although "products and services" is not defined in the MFJ presumably the term includes both telecommunications and non-telecommunications "products and services."

[116] Another provision, Section II(D), which limits the lines of business of the operating companies, affects the equipment markets since it effectively prevents the operating companies from manufacturing their own equipment.

[117] *See* 552 F.Supp. at 163; AT&T (Docket No. 19129, Phase II), 64 FCC 2d 1, 26–45 (1977). We note that in Docket No. 19129 the trial staff recommended that AT&T be required to divest Western Electric.

[118] Some concern has been expressed by general trade manufacturers that the Central Staff Organization will perform some procurement functions and that, therefore, the operating companies will not be as independent as they might

Electric products, it is likely this problem would be transitory and the provision in the Decree that prohibits the operating companies from discriminating among equipment suppliers should keep any such problems to a minimum.[119] Finally, the separation of Western and the operating companies should help to ensure that revenues from the operating companies, through the license contract or otherwise, will not be used to cross-subsidize the research and development of unregulated products by Western.

94. There are several benefits that telecommunications users should obtain from increased competition in equipment procurement by the operating companies. Since 1965, this Commission has expended considerable resources studying the problems of procurement in the Bell System.[120] In Docket No. 19129, Phase II, the Commission concluded that increased competition in the equipment market would result in ratepayers receiving a wider choice of equipment and services in terms of quality and cost to meet their communications needs.[121] We have always believed that increased competition should facilitate operating company purchase of the most cost effective equipment available and accelerate the introduction of new service features. Thus, increased competition in equipment markets brought about by the requirements of the Modified Final Judgment should help satisfy the goals of Section 1 of the Communications Act, 47 U.S.C. §151, of ensuring rapid, efficient service with adequate facilities at reasonable cost and is consistent with long-standing Commission policy.

3. *Other Markets*

95. In addition to telecommunications services and telecommunications equipment, related services and products will be affected by

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otherwise be. AT&T has consistently stated, however, that the CSO will not make procurement decisions and will merely support the operating companies in their procurement activities.

[119] In view of this, we see no reason to require the BOCs to submit their procurement plans to this Commission prior to their submission to the Department of Justice, as Stromberg-Carlson requests. Stromberg-Carlson has failed to convince us that requiring the BOCs to disclose this information now, rather than six months after divestiture, will contribute substantively to our decision here or in Bell System Procurement Practices, CC Docket No. 80–53, FCC 80–699 (1981). At the same time, however, we recognize the importance of monitoring developments in this area and will require the regional holding companies to file their operating company procurement plans with this Commission at the same time the plans are filed with the Department of Justice.

[120] In Docket No. 16258, AT&T, 2 FCC 2d 871 (1965), the Commission first expressed its concern over and intention to investigate possible inefficiencies in equipment procurement by the Bell System. This docket was terminated before the Commission finished its investigation, AT&T, 32 FCC 2d 701 (1971), but the issues raised were eventually incorporated into Docket No. 19129, Phase II.

[121] 64 FCC 2d 1, 26–27 (1977). It specifically found that what little competition there had been in the past had induced Western to reassess its priorities and resulted in the identification of product voids. *Id.* at 26.

the Consent Decree. As noted above, the Consent Decree is styled as a Modification of Final Judgment of the 1956 Decree.[122] The effect of the modification will be to lift nearly all restrictions on AT&T's entry into new lines of business.[123]

96. Prior to the signing of the Consent Decree this Commission had determined that it is in public interest to allow AT&T to compete, through a separate subsidiary, in offering unregulated enhanced telecommunications services and customer premises equipment.[124] By definitively removing the restrictions on AT&T's lines of business, the MFJ is consistent with and complements our objectives in the Second Computer Inquiry.[125] The lifting of the restrictions helps to ensure that the benefits that we saw in AT&T entering enhanced services and equipment will in fact occur[126] and that the vast expertise and resources of AT&T will be available to improve the price and quality of a wide range of services and products to consumers.

4. *Other Benefits of Divestiture*

97. AT&T has argued in its application that the divestiture will "dispel the uncertainty regarding the future structure of the telecommunications industry" that has hindered planning activities, stalled major decisions and slowed the pace of innovation in this country. It states that without this reorganization, continued and expanded controversy could be expected in the industry.[127]

98. We agree with AT&T that at least in some areas implemen-

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[122] *See* para. 13 *supra*.

[123] Under the 1956 Consent Decree AT&T was enjoined from engaging in any business other than common carrier communications services and services incidental thereto. 1956 Consent Decree, *supra* note 17, Section V.

[124] Second Computer Inquiry, *supra* note 3.

[125] One difference between the MFJ and our decision in Computer II is that the MFJ prohibits AT&T from engaging in electronic publishing over its own transmission facilities for at least seven years. *See* 552 F.Supp. at 180–86. Electronic publishing is defined by the court as:

> the provision of any information which a provider or publisher has, or has caused to be originated, authored, compiled, collected, or edited, or in which he has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Id. at 181. After seven years, AT&T may apply to the court to remove this restriction.

[126] *See* Second Computer Inquiry - Tentative Decision, 72 FCC 2d 358, 428 (1979). While the decision of this Commission allowed AT&T to enter these new markets at the time the Decree was signed, there was still debate as to the consistency of our decision with the 1956 Consent Decree. The MFJ, by lifting the restrictions, resolved any doubt as to whether AT&T could enter these markets. (The D.C. Court of Appeals, of course, subsequently affirmed this Commission's decisions in the Second Computer Inquiry).

[127] Consolidated Application at 25.

tation of the Decree will remove uncertainty. The structure of the Bell System has been a target of its competitors and critics for years. In addition, the prohibitions of the 1956 Consent Decree led to much confusion as to the types of services that could be provided by the Bell System. To the extent that implementation of the Decree reduces the controversy surrounding these issues, we believe it is in the public interest.

99. Along these same lines, we believe another benefit that may come from divestiture may be the creation of market conditions more conducive to the reduction of regulation. In the future, this Commission may be in a position to consider changes in our regulatory approach to enable the carriers to function more effectively in the competitive environment and rapidly provide efficient service to the public.[128]

100. In sum, we believe that divestiture, if implemented properly, is likely to enhance competition in interexchange services and telecommunications equipment and should remove the uncertainty associated with the pendency of the Justice Department suit. We believe that in the long run consumers should benefit from an increase in the number and types of services available.

C. *The Effects of Divestiture on Rates and Services*

1. *Post Divestiture Structure and the General Viability of the Carriers*

101. The following section discusses the general viability of AT&T and the operating companies after divestiture. There has been a great deal of concern, particularly from state regulators, that the operating companies will not be viable entities and several commenters have argued that the Plan of Reorganization disadvantages the operating companies.[129] This Commission also has expressed some concerns in this area.[130] In addition, the prospect of divestiture appears to have been at least one of the factors that has led to some changes in ratings of the Bell system's public debt.[131] Despite these concerns, and although we recognize that after divestiture the

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[128] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, CC Dkt. No. 83-1147, FCC 83-482 (Oct. 27, 1983).

[129] *See, e.g.*, Comments of SBS at 9-12.

[130] In our amicus brief to the court, we suggested that the court adopt several modifications designed to ensure the viability of the BOCs. *See* para. 15 *supra*.

[131] For example, on March 11, 1983, Moody's Bond Service lowered its ratings on all the public debt of AT&T and its operating subsidiaries. In its "Special Report: AT&T Divestiture" Moody's explained that the new ratings reflected, in part, additional difficulties it saw caused by the divestiture. The general ratings on the individual companies range from a high of Aal for AT&T to Baal for the Pacific Telephone and Telegraph Company. The other operating companies all have ratings between Aal and A3. (Aaa is the hightest rating given by Moody's, Aal the second highest, and Baal is the eighth highest out of nineteen

companies may have slightly greater problems in raising capital and some may face greater business risks, we conclude that the companies will continue to be strong and financially sound for some time to come. Some of our initial concerns have been alleviated by certain modifications to the Consent Decree[132] and we believe that if the companies make a concerted effort to improve their efficiency and offer new services, they will be able to meet the challenges of alternative suppliers. In addition, there are many emerging opportunities for AT&T and the operating companies.

a. *AT&T*

102. As noted above, after divestiture AT&T will consist of the corporate parent, Western Electric, Bell Labs, AT&T Communications (the interexchange organization), AT&T International and AT&T Information Systems (ATTIS). Except for the divestiture of the operating companies, perhaps the most significant effect of the MFJ on AT&T is the removal of nearly all the line of business restrictions and licensing requirements imposed by the 1956 Decree.[133] After divestiture, AT&T will be able to expand into any business it chooses except for electronic publishing.[134] This obviously is of enormous benefit to AT&T and should be a positive factor in maintaining its viability.

103. With respect to its interexchange services (with which we are primarily concerned), we expect that AT&T will continue to hold a large share of interexchange services for the foreseeable future and will continue to have the resources and expertise to provide adequate service to the public. We note, for example, that AT&T's revenues from toll service increased from $30.189 billion in 1981 to $33.257 billion in 1982.[135] This *increase* in toll revenues for AT&T was greater than the combined revenues of MCI, Southern Pacific Communications, and USTS, its next largest competitors.[136] AT&T has recently filed new tariffs to cover the post-divestiture period and to reflect our access charge decision. In doing so, it has predicted 1984 interstate gross service revenues of $32 billion, which is still approximately 10 times as much as all its interexchange competitors together.

104. AT&T will begin 1984 with approximately 90% of the

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categories). Most of the ratings fell about 3 steps. By way of comparison, GTE's debt rating by Moody's is between Baa2 and Baa3.

[132] *See* para. 16 *supra*.

[133] *See* para. 95 *supra*.

[134] *See* note 125 *supra*.

[135] AT&T: 1982 Annual Report. This figure includes, of course, revenues from intrastate toll that will be intraLATA toll after divestiture and thus will be, at least initially, revenue for the operating companies, rather than AT&T.

[136] *See* FCC Form P for 1982 for each company.

interstate toll business and approximately one half of the intrastate toll business.[137] In 1982 the revenues from interstate toll were approximately $22 billion and the revenues from intrastate toll were approximately $11 billion. In addition, AT&T has estimated that "demand for intercity calling is expected to double by the mid-1980's."[138] The company has a long history of providing high quality service. While divestiture may lead to some problems for AT&T in developing and implementing certain technical standards with the divested operating companies because of its loss of control of these companies, it will be in the best interests of the local companies and all interexchange carriers—including AT&T Communications—to solve these problems.[139] Thus, we see no reason why AT&T's interexchange operations would not be able to continue to provide high quality service at reasonable rates after divestiture.

105. Although we are primarily concerned about the viability of AT&T basic transmission service operations, two other divisions of AT&T—Western Electric and Bell Labs—also are affected by the divestiture. We conclude that both these divisions are likely to continue to contribute to the provision of quality communications services in this country. Although the termination of the standard supply contract and the provision of the Decree requiring the BOCs to treat all manufacturers equally will require Western to develop marketing skills that have been unnecessary in the past, and probably will result in some loss of sales for Western, it should remain a strong competitor in the market. It generally is regarded to have strong management and labor, and is known for producing products of high quality.[140] We also expect that with the removal of the 1956 Consent Decree provision prohibiting Western from producing any products other than those used by the Bell system, Western will move into additional geographic and product markets. Elimination of the standard supply contract also will enable Western to eliminate unprofitable product lines.

106. The provision of the MFJ that most directly affects Bell Labs is that which requires the termination of the license contract, which traditionally has provided about one-half of Bell Labs' funding. While Western Electric apparently will support some of the costs of the Labs previously paid for through the license contract, the Labs will be smaller, both in terms of budget and number of

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[137] Approximately one half of intrastate toll business is intraLATA toll and thus will be provided primarily by the operating companies upon divestiture. The amount of intraLATA toll service retained by the operating companies will vary tremendously in each state, however, depending upon the number of LATAs within each state.

[138] Bell Laboratories Record 7 (July/August 1983).

[139] In Phase III of Docket No. 78-72, FCC 83-178 (May 31, 1983), we have begun to examine how these problems should be handled.

[140] *See, e.g.*, Uttal, Western Electric's Cold New World, Fortune (June 27, 1983).

employees after divestiture. Despite the reduction in size, we believe Bell Labs will continue to play an important role in innovation in the telecommunications industry. As noted by the district court in its opinion, the divestiture of the operating companies should have little effect upon the incentives of Bell Labs personnel to produce high quality research products.[141] In addition, the 1956 Consent Decree required AT&T to grant royalty-free licenses to then-existing patents and to license all future patents at a reasonable fee. Except with respect to the operating companies, which will get royalty-free licenses for five years, this requirement has been lifted by the MFJ and we believe that Bell Labs may have increased incentives to develop new products after divestiture.

b. *The Operating Companies*

107. Although the divested operating companies will face new challenges after divestiture, we believe that they will be able to meet these challenges without unduly risking their overall viability. In terms of assets, the regional holding companies will have between $15 and $21 billion and will rank among the nation's top ten utilities.[142] Thus, each regional company will be almost as large as the largest independent telephone company, GTE, which has total assets of about $22 billion. Operating revenues, based on 1982 data, should be in the $7–10 billion range for each of the regional holding companies and net income should be in the $.8 to $1.3 billion range[143] (GTE's telephone operating revenues were approximately $7.824 billion for 1982 and its net income on telephone operations for 1982 was approximately $843 million).[144] In addition, the operating companies initially will have a relatively low debt ratio, 45%, except the Pacific Company, which will be divested with a debt ratio of approximately 50%. By contrast, GTE has a debt/equity ratio of approximately 56%.[145] All of these amounts compare favorably with those of GTE.

108. On the date of divestiture, the operating companies will provide almost all of the local exchange and local access services

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[141] *See* 552 F.Supp. at 169.

[142] AT&T Information Statement and Prospectus (filed with the SEC, Nov. 16, 1983). *See also* Loomis, Valuing the Pieces of Eight, Fortune, (June 27, 1983). In its application, AT&T states that it is submitting the Section 214 application on behalf of AT&T and the submitting the Section 214 application on behalf of AT&T and the existing BOCs only. It asserts that the regional holding companies will not be carriers subject to Section 214 of the Communications Act. Consolidated Application at 5. It is not clear upon what basis AT&T makes this claim but we question its conclusion. However, we see no need to decide here whether after divestiture the regional companies will be subject to Section 214.

[143] *See* AT&T Information Statement and Prospectus (filed with the SEC, Nov. 16, 1983).

[144] GTE Corporation Annual Report 1982.

[145] Standard & Poor's Compustat Services, Inc.

within their service areas. Although there may be greater competition in these services in the future, which will require the operating companies to improve their efficiency,[146] at present such competition is barely in its infancy. In addition, as the Department of Justice has noted in its competitive impact statement, regulatory supervision of operating company rates should ensure that the operating companies earn a sufficient return on their investment.[147] The operating companies' networks also have one tremendous advantage over possible competitors—their ubiquity. Over ninety percent of all homes and businesses within a BOC's service area already are connected to the BOC's local switches. Thus, at least on the date of divestiture the operating companies will be in a strong competitive position and we believe that they will continue to be in a strong competitive position with respect to local exchange and local access services for some time to come, especially after implementation of our access charge order.[148] Absent developments we do not foresee, the divested operating companies should remain viable suppliers of exchange access services.

109. The operating companies also will provide approximately one half of the intrastate toll service, which today constitutes revenues of about $5–6 billion per year.[149] In addition, under the modifications to the MFJ required by the court in its July 8, 1982, opinion, the BOCs will be allowed to sell customer premises equipment and publish printed directories (the yellow pages).[150] The yellow pages yields more than $3.5 billion in revenues a year.[151] And the companies may provide the potentially lucrative mobile radio service. Finally, although the operating companies are forbidden from engaging in any other activities (including the provision of interexchange services, the provision of information services and the manufacture of telecommunications products and CPE), the companies may apply to the court for removal of the restrictions and any restriction "will be removed upon a showing that there is no

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[146] The staff of the Common Carrier Bureau has been reviewing operating company utilization of local loop and trunking facilities and has found that current utilization levels appear to be lower than optimal. Nonetheless, we believe that the prospect of competition will give the operating companies a greater incentive to forecast demand accurately and build accordingly. This will enable the operating companies to increase efficiency, reduce network expenditures, and become more viable, competitive entities.

[147] Department of Justice, Competitive Impact Statement, 47 Fed. Reg. 7170, 7179.

[148] Third Report and Order in CC Docket No. 78–72, *supra* note 95.

[149] The operating companies will lose approximately one-half of the intrastate toll service to the AT&T interexchange organization. At the same time, they will transfer the facilities (and costs) associated with those revenues to the interexchange organization. In addition, the operating companies will receive revenues from the interexchange companies to compensate them for local access.

[150] In fact, most of the regional operating companies have indicated an intention to reenter the CPE market after divestiture.

[151] AT&T: 1982 Annual Report.

substantial possibility that an operating company could use its monopoly power to impede competition in the relevant market."[152]

110. Despite the size of the operating companies, the potential revenues of their activities and various rulings by the District Court designed specifically to increase the viability of the operating companies, many of the commenters in this proceeding have raised objections to particular portions of the Plan of Reorganization on the grounds that they will disadvantage the operating companies by depriving them of needed assets, personnel or other reserves. We have looked at each of these arguments, and find that the operating companies should not be unreasonably disadvantaged by the various provisions to which objections are raised. Thus, the commenters have not demonstrated a need to condition the application before us.[153]

111. SBS, for example, takes issue with the provisions in the Plan of Reorganization that place on the operating companies a share of the costs of private antitrust suit recoveries based on pre-divestiture causes of action. SBS argues that it is AT&T that has engaged in these anticompetitive acts and that AT&T should therefore bear all liability. We anticompetitive acts and that AT&T should therefore bear all liability. We do not find it unreasonable, however, to continue to place, after divestiture, a share of the contingent liabilities for pre-divestiture anticompetitive activities of the Bell System on the operating companies. It is merely speculative to assume, as SBS does, that any judgments would affect an operating company's viability. Moreover, in a practical sense, the operation of the Bell System as a single entity makes it difficult, if not impossible, to discern whether AT&T or the operating companies were at fault and should be held accountable for anticompetitive activities. Therefore, we find that SBS' contention that the assignment of these contingent liabilities unreasonably disadvantages the operating companies is without merit and we therefore decline to condition the application before us.[154]

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[152] 552 F.Supp. at 195. In fact many of the companies have expressed the intention of entering other areas of activity such as providing billing services.

[153] In addition, MCI suggests that we condition the grant of the application upon AT&T transferring to the BOCs sufficient facilities and personnel to permit each BOC to perform, independently of AT&T, exchange and exchange access functions. Since there is no evidence that the BOCs do not have sufficient resources to perform their various obligations, we do not believe that such a condition is necessary.

[154] SBS raises numerous other issues relating to the viability of the operating companies including the manner in which debt is being assigned, the method proposed for allocating depreciation reserves, and the effect of certain provisions in the shared multifunction facilities contracts. We have reviewed each of these issues and find that nothing raised by SBS rises to the level of injuring the viability of the post-divestiture operating companies. We do not agree with SBS' basic contention that after divestiture the operating companies will be deprived of needed facilities or resources and will be faced with unreasonable increases in

112. SPCC, now known as GTE Sprint, has argued that the method described in the Plan of Reorganization for assigning certain transmission facilities may leave the operating companies at a disadvantage.[155] Specifically, it objects to AT&T's proposal to apply the predominant use test to the entire transmission system for systems that AT&T has designated "backbone" routes. SPCC argues that despite AT&T's description of "backbone" routes as "cohesive transmission systems designed on an end-to-basis" they are, in fact, "numerous short circuit sections in which each trunk connects two termini." SPCC argues that the predominant use test should be applied to each section of these "backbone" routes. According to SPCC, the AT&T proposal will leave the BOCs with older, less efficient, under-depreciated transmission facilities.

113. In the Asset Assignment Detail Work Plan[156], however AT&T defines a backbone facility as one in which the fragmentation of the facility "destroys its technical and economic viability." Thus, it is not clear that SPCC's alternative is physically or economically feasible. Moreover, SPCC provides no support for its allegation that AT&T's plan leaves the BOCs with older, less efficient, under-depreciated transmission facilities. Thus, we have no basis for ordering, as SPCC apparently wants us to, the predominant use test to be applied to each section of the backbone routes.[157]

114. Finally, IDCMA argues that the operating companies will be unfairly disadvantaged if all of Account 232 is assigned to them as proposed by AT&T. IDCMA argues that the "station handling expenses" under that account should be assigned to AT&T along with the CPE to which it relates; to do otherwise, reasons IDCMA,

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their revenue requirements. Thus, SBS has not made the showing that its requested conditions on the application before us would serve the public interest.

[155] Comments of SPCC at 11.

[156] The Asset Assignment Detail Work Plan was submitted as exhibit 10 to the consolidated application.

[157] GTE also objects to the proposed transfer of certain radio facilities. With its Petition to Deny, GTE submitted an affidavit from its General Manager of Interexchange Planning, alleging that several radio facilities that will be retained by an operating company should, in fact, be transferred to AT&T. AT&T responded that these assignments were essentially accurate as filed, although a few were to be modified in a supplemental filing, which was subsequently made. *See* Affidavit of John R. Greiner, appended to Reply Comments of AT&T. GTE has not provided, nor does the record contain, any evidence that the remainder of the facilities listed in the affidavit are improper. Therefore, we do not believe that further action is necessary.

Similarly, we see no reason to require AT&T to file various forms described in the Asset Assignment Detail Work Plan attached to its application as Exhibit 10, as MCI suggests. Comments of MCI at 15. With the exception of the few assignments questioned by GTE, no commenter questions any specific assignments or provides any evidence that facilities are being improperly transferred. In light of this, we do not believe that requiring AT&T to file the information sought by MCI is warranted or would be of particular value to this Commission or the public.

gives CPE to AT&T at less than full cost and unfairly leaves the operating companies with those costs. This issue was raised by IDCMA in CC Docket No. 81–893, relating to the disposition of the embedded customer premises equipment. On November 23 we adopted an order in that proceeding disposing of IDCMA's claim, thus mooting it in this proceeding.

2. *The Effects of Divestiture Upon Rates*

115. In our review of the consolidated application, we have been particularly concerned about the costs of divestiture and the potential effects of those costs upon rates. The steps that AT&T must take to comply with the terms of the MFJ could affect the rates for telecommunications services provided by AT&T and the divested operating companies, as well as other terms and conditions under which these services are provided. The reallocations of assets and functions required by the divestiture may cause shifts in the attributable expenses and invested capital of the various telecommunications services currently being offered by AT&T and the BOCs. In addition, the construction of new facilities necessary to implement the MFJ could affect the revenue requirements, or rates, necessary to cover operating expenses and generate an appropriate return on invested capital. A more subtle effect of the divestiture upon revenue requirements (and, hence, the rates charged for services) lies in the perceptions of the investment community regarding the financial viability of both the regional holding companies and AT&T. Such perceptions may affect the future cost of capital of these entities.

116. In our January 13th letter, we asked AT&T for information on the costs of divestiture and the impact of those costs upon ratepayers. The Common Carrier Bureau twice requested additional cost information from the applicants.[158] Although AT&T has submitted some information relative to the costs of divestiture, there are a number of items of cost for which AT&T claims that it can provide no estimate. In addition, whether a particular cost is attributable to divestiture may be open to question. For example, AT&T has claimed that at least some of the costs of providing equal access would have been incurred even without the MFJ.[159] Thus, it is clear that we do not have sufficient information to make an accurate estimate of the total costs of divestiture.

117. Moreover, we recognize that even were we able to discern the exact costs of divestiture, the impact those costs could have on individual ratepayers would not be certain. We do not have the

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[158] Letter from Chief, Common Carrier Bureau, to Alfred A. Green, Associate General Counsel, AT&T, July 8, 1983; letter from Chief, Common Carrier Bureau to Alfred A. Green, Associate General Counsel, AT&T, Sept. 30, 1983.

[159] In addition, action of the U.S. District Court relative to requests for waivers of the provision of equal access may affect the total costs of divestiture.

information, for example, to determine which costs would be attributed to the various services and jurisdictions. Nor can we determine at this time how much of the costs may be properly included in recognized operating accounts for ratemaking purposes. It is also not possible to predict the actions of the state regulatory bodies, which can have a tremendous effect upon the rates ultimately paid by end users. Moreover, although the general impact of any investment or expenses incurred by a carrier will be to increase the revenue requirements of the entity by which the spending is incurred, this may not be true if, for example, the new construction leads to overall reductions in the cost of service (due, for example, to the use of more efficient transmission technologies) or if certain investment or expenses are disallowed for ratemaking purposes. Finally, we recognize that any divestiture-related rate effects will not be taking place in an economic vacuum. Many other factors will be influencing local and toll rates, including shifts in the national inflation rate and the cost of capital, and other actions by state and federal regulatory bodies.

118. Despite these problems in identifying the cost of divestiture, we nonetheless conclude, in light of the figures that we do have (and considering the probable magnitude of the costs that apparently cannot be predicted with certainty) that the cost of divestiture and effects of those costs on the ratepayers may be significant. At the same time, many of these costs will be relatively short-lived, as they are primarily costs to implement the divestiture. Even if most of the identified costs properly are borne by ratepayers, the revenue requirement per line should not be so great as to affect ratepayers' bills by more than several percentage points over the next ten years. On balance, we find that the probable costs and potential effects on ratepayers, do not outweigh the long-term benefits of divestiture.

119. As noted above, in its application AT&T divided its estimated facility-related costs of divestiture into two categories: network reconfiguration and the provision of equal access. Network reconfiguration costs will be incurred primarily by AT&T for the construction of transmission facilities between the various AT&T POPs. The operating companies will incur reconfiguration obligations in rerouting existing end office-to-end office and end office-to-toll office transmission links that currently cross LATA boundaries. AT&T has projected that in the 1983–1987 period it (as compared to the operating companies) will incur the majority of these costs: 59% of the total expenses of $90 million, and 81% of the total capital spending of $189 million.

120. The costs involved in implementing the equal access provisions of the MFJ were estimated on the basis of the operating companies' plans as of early 1983. As noted above, these plans may change in the future. Of the costs identified, the majority stem from the reconfiguration and reprogramming of existing exchange

switches to provide the special features to the OCCs that are now available only to Long Lines and the intrastate toll operations of the BOCs; the upgrading of tandem switches; the installation of new tandem switches; and the addition of trunking facilities. The costs for these operations will be incurred primarily by the operating companies, which have been projected to incur 91% of the total equal access expenses of $1.197 billion and 100% of the total capital spending of $1.467 billion.

121. In response to the additional information requests of the Common Carrier Bureau, AT&T also has supplied the Commission with certain non-facility-related costs of divestiture. First, while generally proclaiming an inability to segregate divestiture-related administrative costs, it has indicated that it has had outside billings to accounting, banking and other firms amounting to $21.524 million. In addition, it has estimated costs of approximately $55 million for the creation of new stock certificates and shareholder files for the seven regional holding companies and related activities, and costs of approximately $34.250 million associated with changing the AT&T logo.

122. In sum, the divestiture-related cost figures for 1983–1987 that have been supplied to the Commission are as follows:

DIVESTITURE-RELATED COSTS: 1983-1987[160]
($ million)

	AT&T	*BOCs*	*Total*
Expenses			
Network	53	37	90
Equal Access	105	1092	1197
TOTAL	158	1129	1287
Capital Spending			
Network	153	36	189
Equal Access	---	1467	1467
TOTAL	153	1503	1656
Administrative Costs	111		

123. There are several costs for which AT&T has not provided us information. Primarily it claims that most of these costs either cannot be segregated from other costs or simply cannot be predicted. The principal costs involved are the administrative costs (other than those enumerated above) and the costs involved in eliminating the sharing agreements for jointly used facilities. While we have no ability to estimate either of these costs ourselves, our observations of

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[160] AT&T claims that the cost estimates set forth in the application "assumed that all divestiture and equal access costs would be incurred by the end of 1987 even though the actual incurrence of these costs may extend beyond 1987. Accordingly, in its March 1 submission, AT&T included as part of the costs for the 1983–1987 period its estiamte of costs that may actually be incurred subsequent to 1987." AT&T Response at 37–38 (July 29, 1983).

the Bell System in the past two years suggest that considerable time and energy have been expended by AT&T and operating company personnel in preparing for divestiture. We expect, however, that future administrative costs will be relatively small since the costs incurred in preparing for divestiture should be largely of a one-time, nonrecurring nature. In addition, from the information we have on the number and lease costs of the sharing arrangements, we conclude that their termination may entail substantial construction.[161]

124. In its petition to deny the consolidated application, GTE argues that the primary beneficiaries of the reorganization are AT&T and its shareholders and that recovery of the costs related to implementation of the MFJ from ratepayers or other carriers should not be allowed. We have already found that certain aspects of divestiture should be beneficial to ratepayers. At the same time, certain costs incurred to implement the divestiture may provide no benefit to ratepayers. We conclude that it would not be equitable or in the public interest to require ratepayers to bear those costs. It also cannot be denied that the shareholders of AT&T receive certain benefits from the implementation of the MFJ (*e.g.*, the lifting of the restrictions of the 1956 Consent Decree, and the freedom to invest in parts of the system, rather than the whole) and it is equitable, therefore, that they be required to bear some of the costs. With these principles in mind, we conclude that the ratepayers should not bear the administrative costs identified above. These costs, which are of a non-recurring nature, have little relationship to the provision of common carrier service and do not appear to provide direct benefits to the ratepayer.[162] Any other administrative costs that may be

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[161] We know, for example, that the costs to AT&T of leasing jointly used plant from 17 of the operating companies for the plant identified as of July 29, 1983 (which AT&T estimates as 75% of the plant to be leased), is approximately $1.4 billion for 1984. A very rough calculation could be made that the value of the plant to which those leases apply is in the $4 billion range. (This estimate is made by taking the ratio of Bell revenues to gross plant as a proxy for a ratio of lease expenses to investment). Although it is impossible to estimate the costs of replacing this plant since there are so many variables that we do not know, it is clear that there is substantial plant involved and replacement costs also could be substantial. AT&T claims that the sharing agreements will be phased out principally as part of the normal growth and modernization of the operating company and AT&T networks. Nonetheless, even if only a small percentage of the contracts cannot be phased out as part of normal growth, the costs of eliminating the sharing agreements could be hundreds of millions of dollars.

[162] These costs have been estimated by AT&T as follows:

$24 million -	preparation, printing and filing of registration statements; listing of companies on various stock exchanges; processing of payments to shareholders holding fractional shares and handling of shares held in the dividend reinvestment plan
$2 million -	printing of stock certificates

identified in the future will also be borne by the shareholders unless the carriers can demonstrate how those costs directly benefit the ratepayers.

125. With respect to reconfiguration investment and expense, we have insufficient information on those costs to determine whether they are unnecessary, duplicative costs or without any additional direct benefit to ratepayers and therefore whether they should be borne by the ratepayers or shareholders. Although we will require the carriers to include these costs in Account 103, Miscellaneous physical property, or Account 323, Miscellaneous income charges, respectively, they may seek to justify the inclusion of certain of these costs in their interstate rates. Accordingly, we find it is in the public interest to condition the grant of the consolidated application upon AT&T and the operating companies taking the following actions:

1) Within 30 days of the date of divestiture, each company shall identify any divestiture-related administrative costs that have been charged to operations in the division of revenues process and reclassify these costs to Account 323, Miscellaneous income charges. Each company shall notify the appropriate commissions of the amounts identified. At the same time, the companies shall notify the appropriate state commissions that this Commission has determined that the recovery of these costs shall not be included in interstate rates. Any amount already included in interstate rates shall be used to reduce the revenue requirement in the next proposal to revise current interstate rates, including proposals already on file, but not yet effective.

2) Within 30 days of the date of divestiture, each company shall identify and remove any divestiture-related administrative costs currently included in the revenue requirement in any pending interstate tariff filing and reclassify these costs to Account 323. Each company shall identify any such costs currently included in any pending intrastate tariff filing and shall notify the appropriate state commissions that this Commission has determined that these costs shall not be included in interstate rates.

3) Within 30 days of the date of divestiture each company shall reclassify any divestiture-related administrative costs incurred in 1983 not currently included in the revenue requirement in a pending tariff filing or charged to

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$14 million -	processing of return mail option cards
$11 million	computer programs for processing of the option cards
$4 million -	general shareholder support costs
$20 million -	removal of Bell logo from buildings and erection of new logo
$1.25 million	replacement of logo on vehicles
$10 million -	new advertising campaign to introduce new logo
$3 million -	logo changes on stationary, printed material, hardhats, etc.
$21.524 million -	feeds paid to outside counsel, a commercial bank, an investment banking firm and other non-AT&T entities for services rendered in implementing the MFJ. Some in-house legal costs are included in this figure.

operations in the division of revenue process to Account 323. Each company also shall notify the appropriate state commissions that this Commission has determined that these costs shall not be included in interstate rates. Each company shall include any divestiture-related administrative costs incurred in the future in Account 323. The carriers may seek, however to justify the inclusion of certain of these costs in interstate rates by presenting evidence that demonstrates that the costs it purposes to include directly benefit ratepayers. Public comment will be sought.

4) Each company shall include the investment and expenses that have been incurred as well as future investment and expenses incurred in reconfiguring the network, (including those reconfiguration costs incurred as a direct result of termination of the sharing arrangements) in Account 103, Miscellaneous physical property or Account 323, respectively. The carriers may seek, however, to justify the inclusion of these costs in interstate rates by presenting evidence within 60 days of the date of divestiture that demonstrates that the costs it proposes to include are not duplicative and directly benefit ratepayers. Public comment will be sought.

126. Despite our determination that some costs of implementing divestiture should not be borne by ratepayers, there is a possibility that other costs may be included in rates and may affect the carriers' revenue requirements. While we are fully cognizant of the limitations of attempting to determine the effects of these costs upon rates considering the variables that can affect rates and the fact that we only have a portion of the costs before us, we nonetheless have made some rough calculation of the revenue requirement effects of the facility costs that we do have. These calculations are gross estimates and should not be used as an indication that any particular bill would increase by the estimated amount. For example, in determining the rate effect we have not attempted to identify the manner in which revenue requirements will be distributed among the various services offered by either the operating companies or AT&T. In addition, although it is not clear to what extent, if any, network reconfiguration costs ultimately will be borne by the ratepayers, we have included these costs in our calculations because we have not yet made a final determination. Although the operating companies will be incurring by far the largest proportion of the total costs and although we expect that the vast majority of the costs will be recouped through access charges, the precise manner in which these costs will be divided between access charges, local and toll rates is not yet evident. We have therefore computed a *composite* rate effect based upon the total spending by both the operating companies and AT&T.

127. With all of the above in mind, we have attempted to determine the revenue requirement per access line for each of the next ten years occasioned by the facility-related costs identified by AT&T. Although presumably these costs will not be recovered by flat equal charges on each line, our calculations are intended to give an overall picture of the rate impact. In order to make our calculations we have had to make several assumptions. First, we have assumed

that expenditures (expenses and capital spending) will follow the year-by-year schedules as set forth in the application and the bulk of spending will indeed take place in the 1983-1987 time period. Second, we have assumed a rate of return of 12.75%.[163] Third, we have assumed a depreciation expense of 10% per year.[164] Fourth, it is unclear whether normal operating expenses (primarily maintenance expenses) have been included in the expense figures that AT&T has given us for the years 1983-1987. We have assumed that they have but to the extent that they have not, the figures below may be substantially below what they otherwise would have been. Fifth, we have made our calculations based upon 85 million operating company network access lines.[165] While this is the number of lines in service on December 31, 1982, and thus may change in the future, we did not feel that we could make an estimate of any change. Sixth, we have assumed that any expenses incurred in a given year will be recouped in the following year. Finally, while AT&T claims that at least $1 billion of the equal access costs would have been incurred even without the MFJ, we have included all cost estimates provided in the application as it is not possible to determine whether in fact such costs would have been incurred without the MFJ.

128. In order to make our calculations, we have used the formula:

$$RR = OE + DEP + OT + (I \times ROR)$$

where

RR = revenue requirement

OE = operating expenses

DEP = depreciation expense

OT = operating taxes (estimated by using actual ratios of operating taxes to net operating revenues as shown in AT&T's 1982 Annual Report)

I = the net book value of the investment attributable to divestiture capital spending. (This is equal to the cumulative divestiture-related spending less a depreciation reserve calculated on 10% basis.)

ROR = rate of return (12.75)

129. Using the 1983-1987 spending schedules set forth in the application and applying the assumptions and equation stated above, we have made the following calculations as to the average revenue requirement for the years 1984-1995:

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[163] Although the states may allow a different rate of return, we have used the figure 12.75 since it is the rate of return currently authorized for AT&T's interstate services. *See* AT&T (Rate of Return), 86 FCC 2d 221 (1981).

[164] This figure represents an approximate composite depreciation rate which reflects this Commission's depreciation policy.

[165] AT&T, 1982 Annual Report at 27.

REVENUE REQUIREMENT OF DIVESTITURE-RELATED FACILITIES SPENDING IDENTIFIED IN CONSOLIDATED APPLICATION

	Revenue Requirement ($ million)		*Revenue Requirement per Access Line ($)*			
			Per Year		*Per Month*	
Year	*Actual*	*Present Value*[166]	*Actual*	*Present Value*	*Actual*	*Present Value*
1984	71	64	.84	.75	.07	.06
1985	258	213	3.03	2.50	.25	.21
1986	755	567	8.88	6.67	.74	.56
1987	892	609	10.49	7.16	.87	.60
1988	707	439	8.32	5.16	.69	.43
1989	410	231	4.82	2.72	.40	.23
1990	369	189	4.34	2.22	.36	.18
1991	330	154	3.88	1.81	.32	.15
1992	289	122	3.40	1.43	.28	.12
1993	249	96	2.93	1.13	.24	.09
1994	209	73	2.46	.86	.20	.07
1995	171	54	2.01	.63	.17	.05

The above figures do not include any estimate of the revenue requirement that may derive from the elimination of sharing agreements. As noted above, these costs may be substantial and could affect the revenue requirement accordingly.

130. Finally, while we have been unable to make any calculations from the disaggregated figures given for each BOC since many of the costs could not be disaggregated, we have appended hereto a chart showing the costs that we do have on an operating company by operating company basis. These figures show that there is a substantial range in the costs that will be incurred by each operating company.[167]

131. From the figures above, it is clear that divestiture may produce some upward pressure on rates. If, however, the figures that we have been provided are accurate this pressure should not be so great as to produce rate increases that would have a substantial negative effect on the availability of service. For example, the cost estimates that we have been given are equal to only a small percentage of AT&T's average annual construction budget, which has been in the $16-18 billion range for the past several years. We are aware, however, of a great deal of consumer concern over requested rate increases by many of the BOCs. We are concerned that there may be an incentive to take advantage of divestiture to seek unjustified increases. Requests for rate increases during the next few years may, for example, include costs associated with the underutilization of operating company local loop, trunking and other plant due to poor forecasting. Such requests may also include costs

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[166] Actuals are discounted to 1/1/84 assuming a 10% interest rate compounded annually.

[167] *See* Appendix C.

associated with insufficient application of new technologies, which might have fostered higher utilization. Thus, in reviewing requested rate increases, it is important that this Commission and the state regulatory commissions attempt to determine to what extent any such extraneous factors have entered into the request. We believe that in this time of transition, particular care must be taken that any confusion caused by divestiture not become an opportunity for excessive rate increases.

132. In sum, we conclude, from the information provided, that the increase in rates occasioned by the MFJ should not be so great as to have a negative impact on the availability of service. We also conclude that ratepayers should not bear those costs that do not directly benefit them. From the information provided, we are able to identify some of these costs. More information is necessary to determine whether other costs should be borne by ratepayers. Because of the need to track actual divestiture costs, we have conditioned this application upon the submission of semi-annual reports on the costs actually incurred to plan and implement equal access.[168] In addition to the accounting treatment specified above for administrative and network reconfiguration costs, we shall also condition this application upon AT&T and the regional holding companies submitting semi-annual reports on January 1 and July 1 of each year (beginning on July 1, 1984) detailing the administrative and network reconfiguration costs actually incurred in the previous six months for implementation of the MFJ. Additional reports must be filed through July 1, 1994.

3. *The Effects of Divestiture Upon Service*

133. We already have discussed the service benefits that we foresee from the increased competitive opportunities associated with the divestiture. The following section describes the effects of divestiture on the services currently provided by AT&T.[169] While we see some difficulties for consumers in the initial period after

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[168] *See* para. 83 *supra* . We note that in Phase IV of CC Docket No. 78–72, we are developing a plan to monitor the effects of the implementation of end user access charges. *See* FCC 83–254 (released June 8, 1983); *See also* Effects of Certain Federal Decisions on Local Telephone Service (CC Dkt. No. 83–788), FCC 83–357 (released Aug. 1, 1983).

[169] Although service may be affected slightly by implementation of the MFJ, AT&T has stated repeatedly that "all currently offered interstate tariffed services will be maintained after divestiture." *See, e.g.*, Reply Comments of AT&T at 54 (May 5, 1983). In light of this commitment and the requirement under Section 214 that Commission certification be obtained prior to discontinuance of service, we believe that AP/SATNET's request that we condition approval of any grant upon continued provision of these services is unnecessary. If review of AT&T's and the operating companies' tariffs show that there will in fact be any discontinuance beyond that discussed in footnote 72 *supra*, we will require the carriers to file an application under Section 214.

divestiture, and a need to follow closely the changes in facilities and services that may occur, we foresee no problems of a magnitude that would outweigh the ultimate benefits to consumers that increased competition is likely to provide and the problems that could result if we were to deny the application.

134. In its application, AT&T has stated that customers will not experience any discontinuance, reduction or impairment of service.[170] As an example, AT&T notes that all administrative, operational and engineering activities that support facilities "will be available to each [post-divestiture] organization, either by replicating the entire system or by contractual arrangements between the parties."[171] In order to prepare for the post-divestiture world and to ensure a smooth transition, AT&T has devised a plan by which the operating companies are to function in a simulated divested mode for some time prior to January 1, 1984, rather than implementing the new responsibilities on a flash-cut basis.

135. Despite what is apparently a massive effort by AT&T to ensure that divestiture is accomplished in as smooth a manner as possible, we do not accept the implication in the application that there will be no difficulties in implementing the divestiture or that ratepayers will not notice changes in their service. We believe that there is a substantial possibility that some service may be adversely affected by implementation of the MFJ, although we have no evidence that the effects will be major. Moreover, we believe there will be considerable confusion and frustration for ratepayers for some time to come as they attempt to grapple with the new structure of the telecommunications industry.

136. First, there will be some rearrangement of the network occasioned by the MFJ. For example, certain interLATA traffic currently routed over direct class 5 to class 5 trunks will have to be rerouted to an interexchange carrier's POP. We believe that this network rearrangement probably will take place without any service problems since, in the past, similar, but more limited, rearrangements were made smoothly. Even if there are transitional service problems, the operating companies should be in a position to solve

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[170] IDCMA takes issue with AT&T's plans to continue to offer end-to-end transmission service after divestiture, claiming that such offerings could perpetuate AT&T's competitive advantage by fostering the impression of a still-unified Bell System. Additional Comments of IDCMA at 8–11. We fail to see how AT&T's plans in this regard have any bearing on the application before us. In any event, IDCMA itself recognizes that the competitive dangers inherent in providing end-to-end service or acting as its customers' agent in procuring service from the operating companies can be largely eliminated through requirements for disclosure of the operating companies' independence from AT&T and through disaggregated billing. The Consent Decree, as approved, requires the operating companies to give notice of their non-affiliation with AT&T in the AT&T interexchange portion of joint bills.

[171] Consolidated Application at 37.

them quickly and efficiently. On the other hand, there may be some permanent degradation of service. When class 5 to class 5 traffic is rerouted, it will be routed to an interexchange carrier's POP in the originating LATA, through the interexchange carrier's network, to the interexchange carrier's point of presence in the terminating LATA and then through the terminating operating company's network. Thus, interLATA calls that today are routed over direct class 5 to class 5 trunks will be routed over a path that includes at least two, and possibly as many as seven, additional switches.[172] This rearrangement may create additional possibilities of blockage and a slight degradation of transmission quality because of the carrier translation processes that are generally necessary to perform the switching function. It is unlikely, however, that many customers would notice these changes.

137. Second, with the divestiture of the Bell Operating Companies from AT&T, we believe that there will be additional difficulties in achieving optimum network characteristics. In the past, AT&T coordinated the development of interface standards for the telephone industry. With divestiture, increased efforts to coordinate among AT&T, its former operating companies, and other entities and to standarize interfaces will be necessary. The problems inherent in resolving network processes when there is more than one entity providing service do not, of course, stem entirely from the proposed divestiture. AT&T has had to coordinate with the independent telephone companies in the past and coordination with other interexchange carriers has been necessary since the inception of competition in the interexchange market. The divestiture of the operating companies can be viewed as making the problem more complicated, however, since AT&T will no longer control the operating companies. At the same time, the divestiture may spur the operating companies to solve any problems with other interexchange carriers more quickly.

138. Third, AT&T has stated in its application that certain changes in the network that were previously planned will not occur due to the divestiture. Common Channel Interoffice Signalling (CCIS),[173] which AT&T had intended to extend to end offices prior to the signing of the MFJ, may not now be extended to end offices. AT&T states that each operating company will make its own determination as to whether such deployment is justified. Since the inception of CCIS in 1976, AT&T has emphasized the benefits

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[172] Seven switches might be used if the call were routed up through AT&T's hierarchical switching system to a class one office and then down through the system. In its letter of October 14, 1983, to the Chief, Common Carrier Bureau, AT&T states that it assumes approximately 5,000 interLATA class 5 to class 5 trunks, or less than one percent of the class 5 to class 5 trunks in the total Bell network, would be eliminated.

[173] *See* para. 23 *supra.*

provided by CCIS in terms of decreasing the time required for call set up, making more efficient use of communications channels, providing opportunities to offer new customer services, and reducing the opportunities for certain types of consumer fraud.[174] Since we agree that CCIS has the potential to increase the oveall efficiency of the network, we must view the possibility that it will not be provided to end offices as an impediment to innovation in network operations.

139. Because of the prohibition in the MFJ against interexchange routing by the operating companies, AT&T states that the Selective Routing Tandem (SRT) configuration no longer will be deployed.[175] "This configuration would have enabled end offices to concentrate traffic for selected Numbering Plan Areas at certain toll offices, thereby bypassing the normal routing chain."[176] This would have increased the efficiency of the network, and minimized the number of switches involved in certain calls. Failure to deploy SRT, therefore, also can be viewed as a possible degradation of service.

140. Finally, we are concerned that maintenance of service after equipment failure may be more difficult to achieve after divestiture. In its July 8, 1983 letter to AT&T, the Common Carrier Bureau, asked AT&T to comment on the methods under consideration for maintenance of service in the event of failure of a large tandem switch. AT&T responded that:

> In those LATAs where an interexchange carrier has multiple Points of Presence, the BOC will be able to reroute traffic from a failed POP to a surviving POP in the same LATA. In those LATAs not equipped with multiple POPs for a single carrier, the BOCs' capability to switch traffic destined for a failed POP to an alternate location may involve interexchange routing prohibited by the MFJ. In such situations, the selection of an alternate interexchange carrier by the end user [is an option] provided that the alternate carrier has LATA access through a different POP.[177]

141. Thus, it becomes clear that with the MFJ's prohibition of the provision of interLATA service by the operating companies some of the alternate routes previously used when there was a failure of a tandem switch no longer will be available. It appears that the operating company would not, for example, be able to reroute traffic over a direct class 5 to class 5 (or class 5 to class 4) trunk if that trunk were interLATA. If the operating company is unable to reroute quickly the traffic to a surviving POP and other carriers are unable to handle all the traffic, some customers might be unable to make interLATA calls until the failed tandem is repaired.[178] In addition, the local offices homing on the failed tandem may not have access to

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[174] *See* The Bell System Technical Journal, Vol. 57, No. 2, 221–49 (Feb. 1978).

[175] Apparently implementation of SRT was recently begun in several cities.

[176] Consolidated Application at 63.

[177] AT&T Response at 13 (July 29, 1983).

[178] We note that AT&T has indicated that it plans to have only one POP in a number of LATAs.

an operator. Finally, until the trunks to the failed tandem are marked busy in the local offices that are directing traffic to the failed tandem, the local offices will be trying to complete calls to the failed tandem, resulting in essential registers and senders that are also used in completing local and intraLATA toll calls being tied up on calls to the failed tandem. Thus, the failure of a toll tandem also affects the ability of the local office to handle local and intraLATA traffic. In cases of other equipment failure, it may be harder, and more expensive, to locate which among several links in the chain of communication is responsible for the failure and to ensure that remedial action is taken.

142. The service problems noted above are generally of the type that probably will not be noticed immediately by the average consumer except perhaps in the circumstance of failure of facilities, and of course we do not expect there to be failures in the normal course of things.[179] They are also problems that in general we believe can be adequately resolved with careful planning, coordination and improvements in technology. Nonetheless, because of the potential problems and the massive changes that will be occurring in the telecommunications industry in the next few years, we perceive an increased need to review the quality, efficiency, reliability and availability of service. We believe it is important to monitor the implementation of the divestiture so that should difficulties arise we are equipped with sufficient information to recognize and address them.

143. In Phase IV of Docket No. 78-72, we are considering how we may best track the availability of service to the public. We have decided that certain information on the efficiency, utilization, quality and reliability of communications services collected by the regional companies and AT&T for their internal use also must be submitted to this Commission. Thus, we shall condition the grant of the application before us upon the regional holding companies and AT&T providing us with the information discussed below.

144. As a general rule, when seeking information from AT&T in the past, the staff has found that, it was most useful and efficient to collect information from the company's own internal documents. Of course this method of collecting information is also the least burdensome for the carrier since the carrier already has the

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[179] There are several effects of the divestiture, however, that the average consumer may notice on more of a day-to-day basis and may view as a degradation of service. These are effects that relate primarily to the confusion that consumers may feel immediately after divestiture when many of them are required to deal with more than one company for their telecommunications needs. Consumers may be confused as to whom they should call in making inquiries, reporting trouble and ordering service. Although we are concerned about these problems, we believe that in large part they will be transitional and, after a period of time, consumers will become accustomed to the new telecommunications industry structure.

information and need only pass it on to the Commission. To the extent possible, we would like to continue this process. Although the reports, indices and other information we discuss in the following paragraphs generally are reports that AT&T currently produces, they are the types of reports that we expect AT&T and the regional companies (or the Central Staff Organization) will be required to make for themselves after divestiture. Nonetheless, we recognize that some reports may not be prepared, and some information may not be collected, in exactly the same form as AT&T currently uses. What we are interested in is the submission of the same type of information as that listed below. We expect that if the regional holding companies or AT&T desire to alter significantly the manner in which the information currently is provided, they inform the Common Carrier Bureau prior to making such change.

145. For several years, AT&T has provided the staff with a number of document summaries and indices from which the staff selects additional information as needed. First, AT&T currently provides the Commission with weekly copies of the System Letter Summary, which is a synopsis of principal letters and reports released to all of the Bell organizations. These letters and reports address policy and system planning for AT&T services. Second, the staff currently receives from Bell Labs copies of its Technical Memorandum Index (TMI), which summarizes all technical memoranda and reports produced by the Labs. Third, AT&T currently provides an index of the Bell System Practices (BSPs) which specifies the operating practices for both Long Lines and the operating companies. Each of the above indices has proved helpful in the past to understanding technical changes in the network and operating practices and procedures. Therefore we will require AT&T and the regional holding companies (or the Central Staff Organization if it is collecting the information) to provide similar indices and summaries after divestiture.

146. AT&T also currently provides the staff, on a proprietary basis, several databases that allow analysis and insight into the cost, efficiency, and quality of service provided by AT&T. Specifically, the staff receives from AT&T: 1) the database used to generate AT&T's Trunk Administrative Measurement Plan (TAMP) report (TB691 report), which provides aggregate information about trunk utilization; 2) the database used by AT&T to generate Dial Office Load Service Report (DOLSR), which identifies local office switching entities and their utilization; 3) the database used to generate the year-end number 4 ESS Switching Capacity, Utilization and Effectiveness (4E, CUE) plan report; and 4) the E4928 report, which summarizes circuit and route mileage by facility type. AT&T currently collects this information from the operating companies and Long Lines. We believe that continued receipt of this information is critical to the Commission's analysis programs. Accordingly,

we will require AT&T and the regional holding companies (or the CSO) to continue to provide the equivalent data in the future.[180]

147. The reports and indexes described above contain information on trunking efficiences and utilization and performance measures. There is, however, another type of information that we believe we must receive in the future. These are reports on quality of service. Quality of service may be quantified in terms of: 1) ability to access the network, *i.e.*, the availability of dial tone; 2) setup of routes to the destination as dialed, without unacceptable delay; 3) characteristics of the communications path established in terms of acceptability for the use intended, *i.e.*, clarity of speech or data error set performance; and 4) accurate billing.

148. Network service quality as defined above is clearly and distinctly different from the machine and trunking efficiencies, utilization and performance measures previously described. However, both of these measures are interrelated and must be collectively interpreted. For example, measurements in a service area could indicate that quality of service as perceived by the customer was excellent but trunking efficiency and utilization is poor, indicating inefficiency. On the other hand, service may be poor while efficiency/utilization may be excellent. Either case would be cause for concern. Obviously, we must strive for adequate service and efficiency/utilization standards.

149. AT&T currently produces quality of service reports for its management. The Commission staff receives only one general report, however, on a regular basis. This report, the Service and Cost Performance Report, is published monthly and provides aggregate information on a limited number of quality of service parameters. We have concluded that the format and content of the Service and Cost Performance report is not comprehensive enough for our purpose as it does not address sufficient factors. Indeed, even those factors that are addressed are too highly aggregated.[181]

150. We are aware, however, that AT&T has in operation a centralized service reporting system called the Centralized Results System (CRS). The CRS is a report/results information systems database containing basic service quality measurements collected from all of the operating companies. The database for the CRS is derived from measurements of: a) the reported results of end-to-end

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[180] The staff, over the years, has developed reporting formats with AT&T that provide detailed database information records that are in machine readable form with consistent format. We direct AT&T and the regional holding companies either to continue to provide such information in equivalent formats or to inform the Common Carrier Bureau, in writing, if variations are deemed necessary.

[181] Until final reporting requirements are developed, we shall continue to require the submission of the CRS and the Network Results Report. While we have not received the latter report on a regular basis in the past, we believe that it will be necessary in the interim.

call set up attempts, *i.e.*, number of successful completions, failures and causes; b) switching office performance associated with call setup; and c) route availability information associated with call set up attempts. It is not clear that the CRS will be adequate for our purposes. We therefore will require AT&T and the regional holding companies to inform the Common Carrier Bureau whether the system responds to the needs identified above. We will require that each propose other reporting formats that will respond to those needs, and explain how the reliability of the information supplied can be assured. Because AT&T and the regional holding companies likely will want similar information for their own purposes, we expect that common documents, which will avoid any burden on the carriers, can be developed.

151. We are also aware of the activity for the planning and development of a fully-automated Service Evaluation System, known as SES II to replace the presently used manual Service Evaluation System which is included in the CRS and is known as SES I. SES II will generate quality-of-service data for both intraexchange and interexchange end-to-end customer service. This information should be helpful to the Commission and we therefore urge the operating companies to enhance deployment of SES II in the local dial offices and to keep the staff informed of the deployment schedule. We will also require AT&T and the Regional Holding Companies to provide the Commission with descriptions of any reports that may arise out of SES II.

152. The staff also currently receives from AT&T the Construction Budget Summary and copies of the Bell System Statistical Manual as well as the statistical manual published by each operating company. We believe that the information contained in these documents will be of continuing value. Accordingly, we will require that AT&T and the regional holding companies continue to provide the equivalent information in the future.

153. Finally, we note that AT&T has filed on a yearly basis combined Long Lines and operating company requests for interstate facilities authorization pursuant to Section 214 and Section 63.06 of our Rules, 47 C.F.R. §63.06. This filing, referred to as the Blanket, provides the public and the Commission with aggregate information about the network in the form of statistical reports and forecasts. Further, the Blanket has acted as a vehicle by which important issues relating to the network were resolved. It has afforded the Commission an efficient method for processing Section 214 authorizations on a bulk rather than an individual basis. We believe that it would be in the public interest for AT&T and the operating companies to continue filing similar blanket applications in the future. Although composite network filings similar to those filed in the past by AT&T are no longer possible, we believe that individual filings from each company would achieve most of the benefits of the

original Blanket. Accordingly, we encourage AT&T and each operating company, where appropriate, and to the extent possible, to seek Section 214 authorizations by means of a single yearly authorization request as is permitted by Section 63.06.

154. In sum, while we believe that any service problems that may arise from the divestiture can be handled adequately by the concerted efforts of all carriers, we recognize that there is a possibility that the massive changes in the industry caused by divestiture and the rearrangement of facilities may produce unforseen effects on service in selected areas. So that this Commission can be well equipped to identify and respond to any such problems, we believe that it is necessary to condition the grant of the consolidated application on the carriers submitting the facility and service information described above.

D. *The Effects of Divestiture Upon National Security and Emergency Preparedness*

155. This Commission's obligation to review the divestiture's impact on the national security derives from Section 1 of the Communications Act, 47 U.S.C. §151.[182] Since the enactment of that provision, we have consistently recognized the duty to consider national defense concerns and goals when exercising our regulatory responsibilities.[183] Most recently, in the MTS-WATS Market Structure Inquiry,[184] we observed that satisfying national defense needs is a specific goal of the Act. We also have recognized that national defense considerations are properly a part of the Commission's decisionmaking process regarding Section 214 and 310(d) applications[185] because our responsibilities under those sections are to ensure that the public interest, convenience and necessity will not be adversely affected by the transfer of facilities and radio licenses. Accordingly, we must decide whether the divestiture of the Bell Operating Companies from AT&T, as implemented by the transfers of facilities and licenses proposed in the instant application, will impair the national security and emergency preparedness efforts.

156. The plans of the Bell Operating Companies and AT&T for accommodating the needs of national security and emergency preparedness (NSEP) were developed pursuant to Section I(B) of the

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[182] That section provides that the Commission was created, in part, "for the purpose of the national security."

[183] *See, e.g.*, AT&T, 44 FCC 602, 605, (1955); Overseas Communications, FCC 78–755 (released October 26, 1978); Bendix Aviation Corp. v. FCC, 272 F.2d 533, 538 (D.C. Cir. 1959).

[184] 73 FCC 2d 222, 230 (1979).

[185] *See, e.g.*, AT&T, Northeast Corridor Lightguide Cable, 89 FCC 2d 1168, 1179 (1982).

MFJ and Part II(D) of the Plan of Reorganization. The plan, as amended by Amendment 35 to the Plan of Reorganization,[186] describes the roles of AT&T and the divested operating companies.

157. Presently AT&T maintains a government communications organization located in Washington, D.C. which provides a Bell System single point of contact for government NSEP needs, and coordinates NSEP activities by the various Bell System companies. The Plan of Reorganization provides that AT&T will retain this organization as part of its interstate regulated entity. This organization has many years experience with government procurement, service ordering procedures, intra-government relationships and personnel. The employees have the required security clearances and technical and professional skills to respond to any NSEP communications requirement.

158. AT&T represents in its consolidated application that this group will continue to perform NSEP functions other than those operating company-related functions transferred to the Central Staff Organization. For example, it will provide the government a single point of contact with AT&T and its affilates for NSEP needs, including requests for installation, testing or restoration of AT&T-provided NSEP services or facilities. It will coordinate and assist in meeting the government's long-term research, manufacturing or equipment design needs that require the resources of Western Electric, Bell Labs or other AT&T affiliates. This AT&T group also will function as the interface with the government for all aspects of the development of NSEP technical standards, network planning and other forms of nationwide NSEP planning or exercise. Finally, this group also will help coordinate NSEP communications requests that require interconnection between an AT&T affiliate's service and a service provided by an operating company or another exchange company.

159. In their comments filed in this proceeding, the Federal Executive Agencies (FEA) suggested that any Section 214 grant be conditioned on AT&T's future cooperation with other interexchange carriers and non-affiliated equipment suppliers in meeting NSEP communications requirements.[187] We find such a condition unnecessary since AT&T has represented in its application that indeed it will "work cooperatively with the other telecommunications industry entities," and that it will interconnect with other companies

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[186] Amendment 35 clarifies the role of the CSO in directing the NSEP activities of the operating companies; authorizes the CSO communications group to receive from the operating companies the information on operating company assets and resources necessary to respond fully to NSEP needs; ensures that the CSO and the operating companies participate in NSEP exercises; and clarifies that the AT&T government communications group will provide an AT&T single point of contact in both emergency and non-emergency situations.

[187] FEA Comments at 14.

when the government determines that NSEP needs can best be satisfied by such interconnection.[188] We find AT&T's role in the NSEP process, as described above, sufficient to satisfy the government's needs.

160. After divestiture, the operating companies also will have significant responsibility for NSEP communications needs. As noted above, Section I(B) of the MFJ requires an operating company single point of contact to facilitate and coordinate those operating company activities. We note initially that the Federal Executive Agencies are in full agreement with the operating company plan as articulated in the Plan of Reorganization and amended by Amendment 35 and have stated in their comments that "[w]ith such revisions [it] believes that the necessary framework exists for the divested operating companies to meet NSEP needs . . . [and] that the public interest, convenience and necessity [is] satisfied."[189]

161. The operating companies will establish a specialized government communications group within the Central Staff Organization (CSO). It is this group that will coordinate the preparation of nationwide operating company plans for use in NSEP situations including network planning and operational guidelines, nuclear defense planning, and plans to protect or relocate vital operating company personnel in the event of a crisis or emergency. The plan also provides for CSO coordination of activities of the operating company personnel or facilities involved in NSEP responses, including exercises and training activities. The CSO will have the authority to allocate operating company personnel and resources in NSEP situations, activate emergency initiation and restoration of operating company NSEP services, and direct such operating company network routing and other arrangements as needed. The applicants represent that this establishment of the CSO coordination services in no way restricts the government's ability to receive expedited service by going directly to the individual operating company if it should so choose and state that the CSO will be available to assist the government in placing orders directly with the operating companies should expedited delivery of such services be required in an emergenc. The plan also provides that the CSO will act, if requested by the government, as a point of contact for other carriers to coordinate the installation, joint testing, maintenance, restoration, repair, and all other operational aspects of operating company-provided intraLATA NSEP services.

162. The plan further calls for the designation of NSEP coordinators within each operating company in the event of an emergency or crisis. These designated coordinators will interface with the group

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[188] Consolidated Application at 74–75.

[189] Comments of FEA at 10.

in the CSO, the CSO's national alert center, and, if necessary, directly with government NSEP personnel. This coordination will extend to all aspects of the installation, testing and restoration of NSEP activities by the operating companies.

163. Applicants represent that the CSO NSEP planning process would be initiated by an inquiry or request from a government agency, a review of a prior response, or an inquiry or request from the telecommunications industry. In response to such a request, the CSO NSEP single point of contact would organize and conduct planning discussion with representatives of the CSO technical staff, the telecommunications industry, and the government. As a result of the planning discussions and staff work, a planning model would be formulated. It would be reviewed by the regional holding companies and the operating companies and their approval requested. If approval were not obtained, more discussions would be conducted. If approval were granted, implementation of the planning would proceed. The operating companies would notify the CSO point of contact upon completion of the implementation and the CSO would so notify the entity making the initial request.

164. Applicants state that similar logistics would be followed in the event of a NSEP incident. Notification would be provided by and to the government, the CSO NSEP single point of contact, the RHCs and the operating companies. If the government decides that it wants the single point of contact to assume a coordinating role on its behalf, it would request assistance. If a operating company or RHC decides that single point of contact assistance is required, it would so request. If neither the government nor the affected RHC or operating companies require the services of the single point of contact, direct contact would be established as necessary and the RHC and operating companies would respond to the emergency and report the status to the single point of contact and the government. Where either the government or the RHC and operating companies request assistance in responding to an NSEP incident, the single point of contact will direct other RHCs and operating companies to provide the equipment and personnel as required. The single point of contact also would work with interexchange carriers and equipment vendors designated by the govenment.

165. By utilizing their own equipment and personnel resources, supplemented by others as required, the affected RHCs and operating companies would respond to the emergency condition and report the status to the single point of contact. Finally, after the NSEP incident, the CSO single point of contact would organize and conduct an emergency response review. Results would be evaluated to determine if a change is required in emergency preparedness plans or procedures. If a change is required, the NSEP planning process, as described above, would be invoked.

166. MCI claims that the role of this CSO government communi-

cations group is too broad and has requested that we condition any approval of the application upon: 1) the CSO providing "coordination among the operating companies, not coordination between Bell and the government;" and 2) "[t]hat such coordination be limited to . . . national security [emergency] preparedness not . . . *all* government contracts."[190] We think the conditions suggested by MCI are inappropriate. The Plan, as we read it, does not provide that the operating companies and CSO will select interexchange carriers or technical equipment vendors for the government. The government will maintain the option of going directly to the interexchange carrier or carriers of its choice, including the AT&T government communications organization. Nor do we interpret the plan as providing that the operating companies and CSO will coordinate the activities of entities other than the operating companies or the RHCs except in those circumstances in which they have been requested to do so and that activity would be performed under contract. Thus, we see no need to adopt the conditions suggested by MCI. Moreover, we note that the Plan of Reorganization specifically limits coordination of the operating companies by the government communications group in the CSO to the needs of NSEP.

167. In addition to the above plan, both AT&T and the operating companies' Central Staff Organization are participating separately in the National Industry Advisory Committee (NIAC). That Committee provides advice and assists the Commission in planning with respect to the emergency communication needs of the private sector and the Commission's regulatory role in national security and emergency preparedness.

168. Also, the National Communications System (NCS) has proposed a joint government-industry approach to coordinating NSEP planning by telecommunications carriers and equipment vendors. NCS is a group of federal departments and agencies designated by Executive Order and charged with the responsibility of planning for the communications needs of the federal government. To implement the NCS proposal, a Presidential Advisory Committee was formed. The committee, known as the National Security Telecommunications Advisory Committee (NSTAC), consists of executives of telecommunications and information processing firms appointed by the President. NSTAC has formed working groups to study the ability of the nationwide telecommunications network to meet NSEP needs. AT&T and the CSO are members of the NSTAC and its various working groups.

169. While the Plan itself does not specifically address the foreseeable instance of the impact of the failure of a large tandem switching system upon the performance of the NSEP telecommunications functions, the applicants did address that issue at the request

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[190] Comments of MCI at 8.

of the Common Carrier Bureau. The government primarily utilizes dedicated private line facilities for its NSEP communications needs and the applicants state that the use of those facilities would not be affected by the failure of a large tandem switching system (which is part of a public switched network). In the event that government private line facilities are unavailable, a government agency that performs NSEP functions must rely on the public switched network as a "backup" to its normal communications facilities. If during that time a large tandem switching system fails, the applicants state there are alternatives available to government users to assure continuity of interLATA service, such as rerouting their traffic by selecting another interexchange carrier, which would be likely to have a POP location apart from the AT&T POP and would not be likely to have a switching failure at the same time as AT&T. Other alternatives would involve "patching" around a failed switch or maintaining spare capacity that bypasses the failed switching system. After divestiture, as before, the selection of an alternative to be followed when a particular switching system fails would require a case-by-case analysis.

170. After reviewing the AT&T and operating company plans, and FEA's comments, we conclude that the future roles of AT&T and the operating companies in national security and emergency preparedness response capabilities will not be adversely affected by the divestiture and will serve the public interest, convenience and necessity.[191] Although FEA originally had some concerns relating to the role of the CSO and AT&T's willingness to work cooperatively with other carriers, the amendments to the Plan of Reorganization and assurances by AT&T apparently have satisfied FEA.[192] The ability of AT&T and the operating companies working together to provide continuity of service to government agencies that perform NSEP functions does not appear to be diminished as a result of divestiture. Essentially, the operating company-NSEP point of contact will provide substantial assistance in ensuring an effective operating company response to the federal government's NSEP service needs. The operating company-NSEP point of contact will undertake to alert, coordinate, and direct, if necessary, the operating companies' response to critical NSEP communications needs, and will expedite the testing and restoration of operating company services the federal government uses for NSEP purposes.

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[191] We note that the Commission has issued a Notice of Proposed Rulemaking in Phase III of MTS and WATS Market Structure, FCC 83–178 (released May 31, 1983), seeking comments on whether additional NSEP planning should be handled through the Exchange Carrier Association. Our conclusion here in no way forecloses the option under consideration in that proceeding from being implemented should the comments compel that result.

[192] *See* Final Comments of FEA at 1–2. FEA continues to have one relatively minor concern relating to the use of cable on DOD bases. *See* note 113 *supra*.

171. We recognize, however, that this plan standing alone cannot purport to guarantee reliable communications with respect to NSEP arrangements. To this end, we will require both AT&T and the CSO to file annually a report with this Commission fully describing the effectiveness of the NSEP planning and operations of AT&T and the CSO. We believe such a reporting requirement will give the Commission an opportunity to monitor the effect of the divestiture on NSEP needs. The first report will be due January 1, 1985. FEA will be afforded an opportunity to comment on these.

VI. *CONCLUSION AND ORDERING CLAUSES*

172. We conclude that the likelihood of an increase in competition and the benefits to be derived therefrom occasioned by the requirements of the MFJ are likely to outweigh the costs involved, the potential for minor degradations of service in selected areas and the potential consumer confusion caused by the divestiture. Although there may be a period of adjustment in the telecommunications industry and although there may be technical and other problems to be resolved, we conclude that ultimately consumers should see an increase in the number and types of services offered.

173. In making these findings, we acknowledge that we are attempting to predict what will happen in the future on the basis of incomplete information on several aspects of the divestiture. For example, the court has yet to rule on many important and relevant issues, including whether the operating companies will be permitted to expand into additional lines of business and whether, and what, waivers of the equal access requirements will be granted. AT&T also has not supplied us with complete replies to our questions, particularly in the area of the costs of the divestiture. For example, it has not attempted to estimate some of the administrative costs and it has not or estimated what we presume will be large costs of eliminating sharing arrangements. Although we could have trial-like evidentiary hearings on these matters, that would take a considerable amount of time and it is not clear that the accuracy of our perceptions as to what is likely in the future would improve concomitantly.

174. Instead, we will monitor the implementation of the divestiture closely and condition the application upon AT&T and the regional holding companies submitting the service and cost information discussed above so that we will be in a position to act if any effects of divestiture are detrimental to the public interest.

175. Accordingly, IT IS HEREBY ORDERED, that the petition to deny filed by GTE Service Corporation IS DENIED except to the extent indicated above.

176. Further, IT IS CERTIFIED that the public convenience and necessity requires the transfers of the lines enumerated in W-P-C-4955 and the public interest, convenience and necessity will be served by the transfer of the radio facilities and transfers of control

of corporations holding radio licenses described in W-P-C-4955. IT IS FURTHER CERTIFIED, that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service described in this order. Therefore, IT IS ORDERED, pursuant to Sections 214 and 310(d) of the Communications Act and Parts 1, 2, 22, 31, 63, 73, 74, 81, 87, 90, 94 and 95 of the Commission's Rules, that American Telephone and Telegraph Co. and the specified Bell Operating Companies ARE HEREBY AUTHORIZED to transfer the facilities and transfer control of the corporations as described in W-P-C-4955 in accordance with the following conditions:

1) Each regional holding company filing simultaneously with this Commission three copies of the equal access plans required to be filed by its operating companies with the Department of Justice pursuant to Section II(C) of the MFJ. Each company also shall file estimates of all the costs of implementing the plans, the costs of implementing any other plan considered and an analysis of why the plan was chosen. With respect to any new facility to be used for the provision of equal access, each company shall also state whether the facility will be used for any other purpose, describe the other purpose and give an estimate of the percentage of capacity of the facility that will be used for equal access purposes.

2) At the time it files the information required immediately above, each company shall file information on the standards of interconnection provided to AT&T by its operating companies at that time.

3) Each regional company shall file until further order semi-annual reports on January 1 and July 1 of each year (beginning in 1985) on the progress made in providing equal access, including a detailed analysis of the number, location and type of offices from which equal interconnection is available, and the costs actually incurred in the previous six months to plan and implement equal access. In addition, the reports also shall describe any changes made in previous plans submitted to this Commission, the cost differential between any revised plan and any previous plan(s), the reasons for changing the plan(s), and a list of the offices for which an exception to the equal access provisions of the MFJ has been filed with the court.

4) Within 30 days of the date of divestiture, AT&T and each operating company shall identify any divestiture-related administrative costs that have been charged to operations in the division of revenues process and reclassify these costs to Account 323, Miscellaneous income charges. Each company shall notify the appropriate commissions of the amounts identified. At the same time, the companies shall notify the appropriate state commissions that this Commission has determined that the recovery of these costs shall not be included in interstate rates. Any amount already included in interstate rates shall be used to reduce the revenue requirement in the next proposal to revise current interstate rates, including proposals already on file, but not effective.

5) Within 30 days of the date of divestiture, AT&T and each operating company shall identify and remove any divestiture-related administrative costs currently included in the revenue requirement in any pending interstate tariff filing and reclassify these costs to Account 323. Each company shall identify any such costs currently included in any pending intrastate tariff filing and shall notify the appropriate state commissions that this Commission has determined that these costs shall not be included in interstate rates.

6) Within 30 days of the date of divestiture, AT&T and each operating company shall reclassify any divestiture-related administrative costs incurred in 1983 not currently included in the revenue requirement in a pending tariff filing or charged to operations in the division of revenues process to Account 323. Each company also shall notify the appropriate state commissions that this Commission has determined that these costs shall not be included in interstate rates. Each company shall include any divestiture-related administrative costs incurred in the future in Account 323. The carriers may seek, however, to justify the inclusion of certain of these costs in interstate rates by presenting evidence that demonstrates that the costs it proposes to include directly benefit ratepayers. Public comment will be sought.

7) AT&T and each operating company shall include the investment and expenses incurred as well as future investment and expenses incurred in reconfiguring the network (including those reconfiguration costs incurred as a direct result of termination of the sharing arrangements) in Account 103, Miscellaneous physical property or Account 323, respectively. The carriers may seek, however, to justify the inclusion of these costs in interstate rates by presenting evidence within 60 days of the date of divestiture that demonstrates that the costs it proposes to include are not duplicative and directly benefit ratepayers. Public comment will be sought.

8) AT&T and each regional holding company shall submit semi-annual reports on January 1 and July 1 of each year (beginning on July 1, 1984) detailing the administrative and network reconfiguration costs actually incurred in the previous six months for the implementation of the MFJ. Additional reports must be filed through July 1, 1994.

9) Each regional holding company shall file simultaneously with this Commission three copies of the operating company procurement plans required to be filed with the Department of Justice pursuant to Section II(C) of the MFJ.

10) AT&T and each regional holding company shall submit to this Commission indices, summaries and reports containing information similar to that currently contained in the System Letter Summary, the Technical Memorandum Index, the Bell System Practices index, the TB691 report, the database used by AT&T to generate the Dial Office Load Service Report, the database used to generate the 4E, CUE report, the E4928 report, the Bell System Statistical Manual, the operating company statistical manuals, and the Construction Budget Summary.

11) AT&T and each regional holding company shall inform the Common Carrier Bureau as to how it proposes to report basic service quality measurements and shall provide the Commission with descriptions of any reports that may arise out of Service Evaluation System II. Each company shall cooperate with the Common Carrier Bureau in formulating service reports to be filed with the Commission.

12) AT&T and the CSO shall file annually a report fully describing the effectiveness of the national security and emergency preparedness planning and operations of AT&T and the CSO. The first report will be due January 1, 1985 and subsequent reports shall be submitted each January 1 until further notice.

177. The grantees are afforded until January 1, 1984 to decline the authorization as conditioned. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned. Acceptance of this authorization as conditioned shall

not preclude applicants from seeking reconsideration of this order or any part hereof.

178. Finally, applicants' request for exemption from the cut-off rules, Sections 21.31(e) and 22.31(e), 47 C.F.R. §§21.31(e), 22.31(e), and any other rules that may require that grant of the consolidated application be treated as an amendment to any application or in any other proceeding before this Commission IS HEREBY GRANTED. The changes in ownership described in the application clearly are being proposed for an independent legitimate business purpose and not primarily for the purpose of acquiring applications.[193]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A

PLEADINGS

A. *Initial Pleadings Relating to the Consolidated Application*

1. Thirteen parties filed comments or petitions relating to the consolidated application, raising a wide range of issues. Many commenters raised concerns regarding the calculation and recovery of the costs of divestiture. Several parties argue that the cost information contained in the consolidated application was not sufficiently detailed to allow a finding that the transfers are in the public interest and that the Commission should require a full and documented response from AT&T and the BOCs as to the costs of divestiture and how such costs will be recovered.[1] Other parties maintain that certain aspects of the Plan of Reorganization unduly burden the BOCs leading to unnecessary or unfair rate increases. For example, SBS asserts that the method for calculating depreciation reserves is unfair to the BOCs and that the requirement that the BOCs retain the debt of its predecessor operating company will result in an aggregate increase of about $450 million to the BOCs' post-divestiture revenue requirements.[2]

2. GTE Service Corporation argues that it is AT&T shareholders who will reap the benefits of divestiture and that, therefore, all costs associated with the divestiture should be borne by AT&T's shareholders.[3] GTE requests either that we deny the application or condition any approval on the costs being excluded from recognized operating accounts for ratemaking and toll purposes. TCA, however, urges the Commission to defer resolution of ratemaking issues associated with divestiture costs, arguing that this is not the proper proceeding to address such matters, and requests that we make it clear that any action on the application does not constitute Commission approval of AT&T's plans to pass divestiture-related costs to ratepayers.

3. Several of the intercity carriers also object to the amount of information supplied

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[193] *See* Airsignal International, Inc., 81 FCC 2d 471 (1980).

[1] Michigan, for example, requests that the Commission require AT&T to provide all costs on a BOC by BOC basis and an assessment of which portion will be borne by exchange service rates, intraLATA toll rates and interLATA toll rates. Comments of Michigan at 2. MCI similarly seeks documentation showing how costs were established and who will bear these costs. Comments of MCI at 16–17. *See also* Comments of TCA at 3, 6; Comments of GTE at 15–16.

[2] Comments of SBS at 11–12.

[3] GTE Petition to Deny at 4–5. MCI similarly argues that costs attributable to the MFJ must be borne solely by AT&T. Comments of MCI at 17 n.12.

on current planning for equal access and question whether equal access will, in fact, be provided. For example, SBS argues that the application does not discuss subzones as the Commission requested in its January 14th letter. It also alleges that many technical issues such as noise, loss and echo standards are not adequately addressed, that no analysis of the costs of alternative proposals is given, and what information is given by applicants indicates that not only will equal access be denied but that AT&T's proposed method of providing access will cost billions of unnecessary dollars. SBS provides a series of specific transmission parameters that it believes must be met in order for equal access to be given and claims that equal access can be provided most efficiently by direct OCC connection at the Class 4 office. In light of this, SBS urges the Commission to begin an investigation into technical equal access issues and to require AT&T to submit an analysis of the costs of alternative approaches to providing equal access. SBS further suggests that we condition any grant of the application upon the outcome of this investigation and upon the BOCs obtaining sufficient resources from AT&T to provide equal exchange access.[4]

4. Echoing SBS' concerns, SPCC argues that the application has not provided sufficient information to justify the BOCs' plans to construct new access tandems. SPCC alleges that the new facilities will provide inferior access for the OCCs[5] and will unnecessarily increase the costs to the OCCs of securing local exchange access. As an alternative, SPCC suggests that the BOCs should provide access to all carriers, not just AT&T, through existing Class 4 offices. SPCC therefore urges us to require AT&T to explain, on a case-by-case basis, what construction the BOCs plan to undertake to comply with the equal access provisions, the costs involved, and the availability and cost of alternative methods for satisfying the equal access requirements.[6]

5. Along the same lines, MCI states that AT&T's submission on equal access is uninformative and that we should require the applicants to supplement the application with more information on its current plans for provision of equal access. In particular, MCI alleges that various noise and loss and transmission standards described in Exhibit 14 to the application are not sufficient to determine the quality of access to be obtained. MCI also argues that the information submitted shows that the Bell companies intend to break the commitment under the MFJ concerning equal interconnection. In order to remedy the alleged defects in information on equal access and the possibility that unequal access will in fact be provided, MCI suggests that the Commission request additional information and condition any grant of the application upon: 1) each BOC providing by September 1, 1986, equal access at all of its end offices, unless such end office is exempted from such requirement by the court, 2) as to such exempted end office, equal access being offered by the time the premium access charge imposed upon AT&T is eliminated pursuant to the Commission's Access Charge proceeding,[7] 3) each BOC filing with the Commission detailed plans for accomplishing equal access and reports on the progress made, 4) AT&T and its affiliates transferring sufficient resources to the BOCs to permit each BOC to perform exchange and

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[4] As an example, SBS alleges that "OCC lines will actually be sixteen times noisier than AT&T's, OCC blocking probabilities will be five times worse than AT&T's, [and] OCC echo performance will be more than twice as poor as AT&T's . . . ." Comments of SBS at 3.

[5] SPCC notes that both the No. 1-ESS and No. 1A-ESS, which will be used for access tandems, are analog two-wire switches. It states that "[t]he interference between those switches and four-wire digital connecting trunks and the OCCs' four-wire transmission systems will create noise, loss, and echo on OCC transmissions." Comments of SPCC at 9.

[6] In an attachment to its comments, SPCC suggests specific questions that we should raise.

[7] Third Report and Order in Docket CC 78-72, FCC 82-259 (Feb. 28, 1983), *reconsideration*, FCC 83-356 (Aug. 22, 1983).

exchange access functions, 5) each BOC filing just and reasonable access charge tariffs, and 6) AT&T and the BOCs complying with all provisions of the MFJ.

6. Access to AT&T's network was also of concern to one commenter. SBS asserts that AT&T has, and will retain, a dominant position in the provision of intrastate interLATA traffic. Further, noting that AT&T is the only carrier with a pervasive national network, SBS argues that competing carriers will remain dependent upon AT&T for essential interconnection facilities. SBS therefore urges the Commission to condition any grant of the application on AT&T providing to the OCCs fair and reasonable access and interconnection to AT&T's intercity network, including CCIS, under arrangements that reflect the carrier-to-carrier nature of such interconnection.[8]

7. Three commenters also raise general questions on the facilities to be transferred. MCI argues that the consolidated application, which it characterizes as giving simply an "outline of a general procedure for divestiture" and a list of assets and facilities to be transferred or assigned," is insufficient because it does not include information on how AT&T and the Bell Operating Companies determined which assets to transfer and thus the Commission cannot determine "that these licenses are the proper ones to be transferred or assigned to accomplish divestiture."[9] MCI therefore urges us to require applicants to file the Asset Assignment-Problem/Resolution Control Forms and various other forms described in the Asset Assignment Detail Work Plan,[10] for at least two areas so that the Commission can ensure that divestiture is being correctly implemented. SPCC objects to the method by which the predominant use test is being applied to certain long-haul transmission facilities, which AT&T has designated as "backbone" routes.[11] SPCC argues that the predominant use of certain sections of these routes appears to be intraLATA and requests that the Commission require AT&T to supply predominant use studies regarding these sections.[12] SPCC requests that action on the application be deferred pending receipt of this information. In addition, GTE attached to its petition an affidavit from its manager of interexchange planning claiming that certain radio facilities were improperly assigned.

8. In another facility-related matter, two commenters raise questions about the disposition and use of multifunction facilities. MRC objects to the Plan of Reorganization provisions concerning the sharing of conduit under the proposed shared network facility agreements, noting that these agreements provide AT&T with exclusive rights to local conduit facilities.[13] MRC asserts that local conduit facilities comprise key means of connection between interstate carriers and customers and that therefore AT&T will have advantageous access opportunities not available to other carriers. MRC further argues that neither AT&T nor the Department of Justice have formulated appropriate safeguards or limitations on the use of these facilities to ensure that the sharing arrangement is non-discriminatory with respect to intercon-

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[8] Petition of SBS at 7–9.

[9] Comments of MCI at 14.

[10] The Asset Assignment Detail Work Plan was attached as Exhibit 11 to the consolidated application.

[11] AT&T has proposed to assign ownership of these routes to itself. AT&T states that these routes are "cohesive transmission systems designed on and end-to-end basis" (Consolidated Application at 48) and thus are properly assignable to AT&T despite the fact that they consist of numerous shorter sections connecting two termini and despite the fact that the facilities carry both intraLATA and interLATA traffic.

[12] Comments of SPCC at 12–13.

[13] Comments of MRC at 4–6. "Conduit" is defined by AT&T as outside plant which is used to carry network transmission cables from one central office building to another and from central office buildings to customer premises. Plan of Reorganization at 52.

nection and use of the conduit and the charges that may be applicable. To ensure that other carriers obtain access lines and connections to and from its customers on terms no less favorable than those given AT&T, MRC urges that we condition approval of the application on AT&T and the BOCs tariffing their conduit sharing arrangements and making the tariffed offering available to other carriers on identical terms. MRC also requests that the Commission require AT&T and the BOCs to furnish all cost data and other information requested under Part 61 of the Commission's regulations so that a determination can be made as to whether the agreements are cost-based and non-discriminatory. In addition, MRC urges that these filings should include a report on the purposes for which the shared conduit will be used so that compliance with the MFJ can be verified.

9. SBS expresses a different concern regarding the transfer of assets between AT&T and the operating companies. SBS asserts that a number of provisions in the Plan of Reorganization, particularly those regarding the sharing of multifunction facilities, could either deprive operating companies of facilities needed to provide exchange service and equal exchange access or unreasonably increase the operating companies' revenue requirements for exchange access while lowering those of AT&T for its competitive services. More specifically, SBS requests Commission modification of the provisions in shared facilities contracts relating to rights to proprietary information (especially rights to software), penalties, termination liabilities, rights to subcontract shared facilities, BOC liability for modernization of AT&T's plant, and lease charges for spare capacity. SBS further requests changes in the Plan's depreciation and debt assignments as well as changes in those provisions which place on the BOCs a percentage of the costs of private antitrust suit recoveries based on pre-divestiture causes of action against AT&T.[14]

10. Two parties also raise questions concerning the role, responsibility, capability and authority of the CSO point of contact for NSEP. The Federal Executive Agencies argue that the role of the CSO as set out in the application must be expanded to be consistent with revisions to the Plan of Reorganization that the Department of Defense had worked out with the Justice Department in March of 1983. In addition, the agencies request that to the extent that the planning for the single point of contact for NSEP needs contemplates that a specific NSEP "incident" occur before any emergency response process will be initiated, the plans must be changed to reflect a role for the point of contact in the critical day-to-day operational communications. Finally, the Executive Agencies argue that any grant of the application should be conditioned upon AT&T's future cooperation with other interexchange carriers and equipment suppliers in meeting NSEP needs.[15]

11. Finally, two parties suggest that we withhold final action on the application pending actions in certain other proceedings. IDCMA states that consideration of the application is premature until the proceedings in the district court on the Plan of

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[14] Petition of SBS at 9–12.

[15] Comments of FEA at 9–14. MCI states that the Plan fosters the idea that only the BOCs and AT&T can be looked to for NSEP needs. It requests that we condition grant of the application on the CSO providing only a single point of contact for coordination among the BOCs, as opposed to coordination between the Bell System (including AT&T) and the government, and providing coordination only to meet national security needs. In addition it asks that we require the divested companies to report annually on how they plan to satisfy national security needs. Comments of MCI at 7–8, 12.

Reorganization are concluded and AT&T indicates that the application is no longer subject to amendments.[16] MCI urges the Commission to withhold action until AT&T submits access charge tariffs.[17]

B. *AT&T's Reply*

12. In its reply, AT&T argues that because no commenter disputes that the basic reorganization is in the public interest and no objections were filed relating to the specific transfers, the tranfers are clearly in the public interest and the application should be granted. The majority of the issues raised by the commenters are, according to AT&T, "collateral issues that go impermissibly beyond the scope of this proceeding."[18] Applicants assert that evaluation of the transfers of lines, construction permits and radio licenses for which authorizations are sought is unrelated to equal access, tariffing, sharing of conduit and other issues raised by the commenters. Applicants argue that some of these issues are being addressed in other proceedings,[19] that the Commission has jurisdiction to investigate the remaining matters in tariff and other proceedings, and that to delay the review of the consolidated application until resolution of these issues would not be in the public interest. The Commission's role in this proceeding, according to AT&T, is simply to "review whether particular transfers satisfy the public interest standard" and not to "police detailed implementation of the Plan of Reorganization."[20] Along these lines, AT&T contends that no commenter has demonstrated how any additional information would assist the Commission in reviewing the application and states that the data contained in the application is more detailed than the data in similar applications.[21]

13. Despite AT&T's labeling the equal access, ratemaking, and sharing of conduit issues as beyond the scope of the proceeding, it did address each issue substantively. With respect to equal access, it submitted as Attachment A to its Reply Comments a March 14, 1983, document that had been submitted to the district court in reference to objections to the Plan of Reorganization. This document, which is more detailed than Exhibit 14 to the consolidated application, attempts to refute the claims that the current planning shows that access will not in fact be equal. Applicants take issue with SBS' and SPCC's suggestion that BOCs should provide exchange access through only those access tandems that also provide a Class 4 switching system and urge that

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[16] Comments of IDCMA at 1, 5.

[17] Comments of MCI at 13–16. AP/SATNET does not request deferral but urges us to make clear in any grant of the application that the tariff plans outlined therein are not deemed approved by the grant. Further, AP/SATNET requests that any grant be conditioned upon AT&T and the BOCs retaining all current jurisdictionally interstate Bell services in any new or revised tariffs described in the application. Comments of AP/SATNET at 3–4. The New York State Department of Public Service asks that to the extent that AT&T is seeking Commission authorization for transactions other than those governed by Sections 214 and 310, its application should be denied. Comments of NY at 2. Finally, ICA simply asks that the issues surrounding embedded customer premises equipment be decided as soon as possible. Comments of ICA at 3.

[18] Reply Comments of AT&T at 7.

[19] Applicants refer to the Third Report and Order in CC Docket 78–72, FCC 82–579 (Feb. 28, 1983) (access charges); NPRM in CC Docket 78–72, FCC 83–178 (May 31, 1983) (Phase III on interconnection policies); and the NPRM in CC Docket 81–893 (embedded CPE).

[20] Reply Comments of AT&T at 17.

[21] For example, AT&T asserts that the voluminous and detailed information requested by SPCC regarding predominant use studies of "backbone" routes would not further the Commission's analysis of the divestiture. Reply Comments of AT&T at 15–16.

the operating companies must be permitted to make their own choice of switching systems based on all factors they deem relevant, as the district court held in ruling on the Plan of Reorganization. To mandate otherwise, AT&T argues, would be impractical, unworkable and costly.[22] Moreover, AT&T argues that if the OCCs obtain access to the same Class 4 functions used by AT&T, AT&T would have to coordinate any changes of most of its switching machines with the operating companies, and at least indirectly with the OCCs. According to AT&T, this would seriously undermine its ability to replace these switching machines or make changes that would provide improved services and would hinder the establishment of full and fair competition in providing interstate services. AT&T concludes that there is no basis for assuming that in every circumstance the best place for interconnection is a switch that performs a Class 4 function.[23]

14. Further, AT&T asserts that there is no basis for requiring the operating companies to use only 4-wire digital switching systems as access tandems. AT&T contends that any claims that 2-wire analog switching systems, such as the No. 1 and No. 1A ESS switching systems, will provide unequal performance because of additional 2-wire/4-wired and analog/digital conversions are unwarranted. The effect of these conversions, according to AT&T, will be negligible and imperceptible to customers.[24]

15. In addition to being beyond the scope of this proceeding, AT&T contends that the disallowance of all reorganization costs for ratemaking purposes, as urged in GTE's petition to deny, would not be in the public interest. First, AT&T states that GTE misstates the costs of separating the BOCs from AT&T; that is, that the great bulk of the costs discussed by GTE are costs associated with the provision of equal access and would have been incurred in any event. Second, AT&T asserts that the claim that the MFJ was designed primarily to benefit the private interests of AT&T shareholders is contravened by the prior pronouncements of the courts and this Commission that the reorganization is in the *public* interest. Finally, AT&T argues that sound ratemaking principles and policies require that the costs of service be recovered by the providers of service and that to bar the BOCs from recovering equal access and network reconfiguration costs would "threaten the viability of the BOCs and the effectuation of the Commission's policies."[25]

16. In response to MCI's contention that Commission action on the application should be withheld until the operating companies provide more details of their access tariffs, AT&T argues that no details could have been provided in the application because this Commission's access charge order was issued only one day before the consolidated application was due to be filed and, in any event, the BOCs will be in no position to file access tariffs until the issues raised in the proceeding are resolved.[26] In addition, AT&T states that AP/SATNET's request that the Commission require

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[22] Reply Comments of AT&T at 36–37, A-9–10. AT&T also objects to SBS' proposal that AT&T provide access to its CCIS network. AT&T states that under existing policies competitors already have extensive access to AT&T's network and that SBS' request is simply an attempt to avoid the cost of installing its own CCIS capabilities while denying to AT&T the competitive benefits which should flow from AT&T's CCIS network. *Id.* at 35 n.*

[23] *Id.* at 38–39.

[24] Applicants note that an analog to digital conversion at the access tandem switching system is not necessarily required by its equal access plans; digital facilities are not required for direct, tandem connecting (TC) or tandem interLATA connecting (TIC) trunk groups or always used on intertoll trunks by AT&T. Applicants further note that the TC trunks can be 2-wire if appropriate toll standards can be met. Reply Comments of AT&T at A-12 n.*

[25] Reply Comments of AT&T at 46.

[26] *Id.* at 51–54.

AT&T and the BOCs to continue providing all currently offered interstate tariffed services is unnecessary, noting that this commitment has already been given in the application.[27]

17. Responding to Midwestern Relay's request that all carriers have a right to access conduit, AT&T argues that MRC has mischaracterized the matter as an exchange access matter when, in fact, the sharing of conduit does not involve access as contemplated in the MFJ.[28] Rather, AT&T's sharing of conduit is simply sharing of multifunction facitlities, which is clearly contemplated in the MFJ. AT&T states that AT&T, like MRC, will obtain access to the BOCs' local exchange networks under the BOCs' local exchange access tariffs—not through shared facilities under shared network facilities agreements. Moreover, AT&T asserts that under Amendment No. 29 to the Plan of Reorganization[29] AT&T's sharing of conduit under contract will be supplanted by any tariffs offered by the BOCs to other carriers. AT&T further notes that the contract charges, which will be computed by the BOCs, will be fully compensatory and may be considered in appropriate ratemaking proceedings.

18. Finally, there are two issues that AT&T does not claim to be outside the scope of this proceeding. With respect to the argument that the Commission should delay action upon the application since action would be premature or the underlying data is "tentative," AT&T simply notes that the Commission established the March 1 filing date, that should it be necessary amendments to the application will be filed, and that "no sound reason for delay has been advanced."[30]

19. With respect to the impact of the transfers upon national security and emergency preparedness, applicants state that amendments to the Plan of Reorganization, as well as various provisions in the application, should solve the concerns of the Federal Executive Agencies. AT&T also specifically responds to FEA's concern about AT&T's future cooperation with other interexchange carriers and non-affiliated equipment suppliers in meeting NSEP requirements. AT&T notes that if FEA is concerned as to whether AT&T will cooperate with these entities, these assurances have been provided in the application. If, however, FEA is proposing that AT&T "coordinate" these entities in meeting NSEP needs, AT&T expresses objection to this proposal since it would have AT&T assume, on its own, a coordinating role with respect to competing entities.[31]

20. As for MCI's NSEP concerns, AT&T asserts that they are simply not valid and that both the conditions proposed by MCI therefore should be rejected. AT&T argues that MCI's first proposed condition that the CSO provide coordination only among the operating companies, not coordination between AT&T and the government, is unwarranted. AT&T states that, contrary to MCI's assertion, neither the operating companies nor the CSO will select interexchange vendors for the government, nor will they otherwise coordinate the activities of entities other than the operating companies, except when requested by another entity and performed under contract. AT&T further argues that MCI's second condition, that coordination be limited to NSEP needs, is likewise unwarranted since the Plan of Reorganization specifically limits coordination to these needs only.[32]

C. *Comments in Response to AT&T's Reply of May 5*

21. Eight parties submitted comments in response to AT&T's reply. Many of the

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[27] *Id.* at 54–55.

[28] *Id.* at 55–58.

[29] All the amendments to the Plan were submitted in applicant's March 30, 1983 supplement to the consolidated application.

[30] Reply Comments of AT&T at 6, 11–12.

[31] *Id.* at 21–22.

[32] *Id.* at 23–25.

comments take issue with AT&T's assertion that matters regarding equal access, tariffing, sharing of conduit and other issues are outside the scope of this proceeding. MCI, for example, argues that a broad public inquiry and imposition of its requested conditions relating to equal access are appropriate.[33] MCI states that the Commission's responsibility to review these issues arises from three sources: 1) the requirement to make a public interest determination in reviewing a Section 214 application; 2) AT&T voluntarily chose to discuss the details of equal access in its application; and 3) equal access issues are inextricably intertwined with consideration of the proposed transfers of the interstate lines themselves. MCI argues that Commission precedent supports the Commission's broad power here and that the imposition of conditions is the logical vehicle to allow the Commission continued oversight over equal access. SPCC also argues that equal access considerations cannot be separated from decisions about which facilities will be transferred since these decisions will determine what trunking and switching facilities remain with the operating companies for purposes of providing local access to interexchange carriers after divestiture.[34] Similarly, GTE argues that its proposal regarding the allocation of AT&T's divestiture costs is directly related to this proceeding, contrary to AT&T's assertion otherwise. GTE notes that the Commission specifically recognized the need to address the costs of divestiture and the public interest implications of implementing the MFJ in its January 14, 1983 letter to AT&T.[35]

22. Several commenters also suggest that AT&T still has not provided enough information regarding the divestiture for the Commission to evaluate whether the transfers are in the public interest. MCI asserts that further information is necessary to allow the Commission to determine whether Bell assets have been divided in compliance with the methodology that AT&T says it has adopted and in a way which will ensure the viability of the operating companies.[36] MCI, Florida and Nebraska request additional information to allow the Commission to assess the total costs of divestiture.[37]

23. In addition, several commenters reiterate the need for additional information on equal access planning. SPCC recommends that the Commission require AT&T to submit information regarding the current status of such planning and answer SPCC's specific questions concerning equal access.[38] SBS states that AT&T's reply was not responsive to its concerns about equal access, intercity interconnection and CCIS

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[33] Final Comments of MCI at 3.

[34] Final Comments of SPCC at 5.

[35] *See also* Final Comments of SBS at 2.

[36] Final Comments of MCI at 14–16. In addition, SPCC notes that AT&T has not provided the predominant use studies of "backbone" facilities SPCC had requested in its comments and renews its request for the information.

[37] Final Comments of MCI at 16; Comments of Florida at 4; Reply Comments of Nebraska at 3. These commenters also support GTE's request that once these costs are determined, they should be separated from operating accounts so that divestiture-related costs will be borne by AT&T shareholders and not by ratepayers and connecting carriers. Comments of Florida at 3; Reply Comments of Nebraska at 2. GTE also argues that contrary to AT&T's claim otherwise, its proposal is not inconsistent with TCA's position that the Commission need not resolve these ratemaking issues prior to action on the application. GTE argues that it is not suggesting that the Commission allocate all divestiture costs by January 1, 1984 but only that AT&T provide the Commission with an itemization of all costs to date and a description of the accounting treatment given such items. GTE states that this satisfies TCA's goals of requiring full disclosure and proper regulatory treatment of divestiture costs without delaying the reorganization. Final Comments of GTE at 4–5.

[38] Final Comments of SPCC at 6.

interconnection requests and urges the Commission to condition any grant of the application upon the outcome of further investigations into these matters.[39] MCI, however, disagrees with SBS' suggestion that the Commission adopt specific transmission parameters for equal access. Noting that different carriers and different uses of BOC facilities may require different technical parameters, MCI requests that we allow the carriers involved to work out their own standards.[40]

24. Finally, FEA notes that AT&T's reply satisfies its concerns regarding NSEP needs. FEA also notes that it disagrees with MCI's suggestion to limit the capabilities of the central staff organization and states that it substantially agrees with AT&T's response to MCI's proposals.[41] Moreover, FEA points out that grant of MCI's request that a single point of contact be coordinated among the operating companies only, and not among the AT&T and the government, would defeat the entire purpose of having a single point of contact which is responsive to the FEA's NSEP service needs.

D. *Further Comments Relating to the Supplementary Information Filed by AT&T*

25. Nine parties filed comments in response to the Commission's Public Notice requesting comment on the additional information filed by AT&T.[42] These comments address issues previously raised and raise several new ones. Three commenters argue that the cost information provided by AT&T still was not complete. The BOCs, who filed for the first time, observe that AT&T's cost estimates for equal access implementation do not include certain costs that may be incurred by the BOCs depending on the resolution of several equal access issues. These possible additional costs include: (a) costs of converting end offices to full equal access if a waiver is denied,[43] (b) costs of providing equal access for other services, and (c) costs of handling undesignated interLATA calls.[44] The BOCs also note that other BOC costs have not been described by AT&T including: (a) costs associated with rehoming Class 4 and Class 5 trunks to an AT&T point of presence to conform to LATA boundaries, (b) certain transmission and switching costs related to network reconfiguration, (c) BOC costs for network reconfiguration that will continue beyond 1987, and (d) costs of rearranging dedicated access circuits to conform to LATA boundaries.[45] All these costs, according to the BOCs, are eligible for recovery through access charges or the AT&T reimbursement guarantee provided for by the court.

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[39] Final Comments of SBS at 2–4. In addition, responding to AT&T's argument regarding CCIS interconnection, SBS notes that CCIS' development was paid for at ratepayers' expense and that the benefits of CCIS should therefore accrue to all customers. SBS also notes that it agrees with MRC's concern about ownership of local conduit facilites, asserting that such conduits would give AT&T bypass capability not shared by other intercity carriers.

[40] Final Comments of MCI at 13–14. IDCMA also suggests that an appropriate condition on any grant may be to prohibit AT&T from offering end-to-end transmission services or if such service is allowed, to require that bills separately state the costs of exchange and interexchange service. To allow otherwise, IDCMA argues, would undermine the purpose of the divestiture. Response of IDCMA at 3–5.

[41] Final Comments of FEA at 2–4.

[42] In addition, SBS filed reply comments, although it did not file initial comments, in response to the comments on the supplementary information.

[43] By using the term "nonconforming" apparently the BOCs are describing the older smaller offices described in Appendix B, Section A3, of the Plan of Reorganization, which will not be required to fulfill the equal access provisions if the court finds that the costs of doing so outweigh the benefits.

[44] Letter of BOCs at 1–2.

[45] *Id.* at 2–4.

26. GTE also contends that AT&T has failed to identify substantial reorganization expenses and questions AT&T's assertion that equal access costs would have been incurred without the MFJ.[46] Arguing that there is precedent in the Computer II decision for the Commission to take action to protect ratepayers, GTE renews its recommendation that any grant of the application be conditioned to ensure that all reorganization costs be identified and borne solely by AT&T's shareholders.[47]

27. GTE Sprint[48] asserts that neither AT&T's July 29th filing nor its model shared network facilities agreement have provided any meaningful information regarding shared multifunction facilities such as conduit and switching systems. Without specific information on lease charges and terms for these facilities, GTE Sprint argues, the Commission will be unable to determine whether AT&T is being charged a rate that is equivalent to tariffed rates being charged to competitors for similar facilities.[49] To ensure that AT&T will not be given a competitive advantage through leasing arrangements, GTE Sprint suggests that we require the operating companies to offer OCCs use of the same facilities at the same charges as provided to AT&T or, alternatively, to require that any disparity between lease charges and tariffed rates for similar facilities be eliminated.[50]

28. MRC renews its request that the Commission require AT&T and the BOCs to make conduit available to all carriers on a nondiscriminatory, tariffed basis.[51] MRC disagrees with AT&T's position regarding the Commission's authority to regulate conduit, arguing that Section 224 of the Communications Act does not limit the Commission's authority in this case.[52] Rather, MRC belives that Section 224 is an additional grant of authority to the Commission to regulate pole attachments to cable television systems and does not limit the Commission's authority with respect to common carriers.[53] MRC adds that the Communications Act does, in fact, provide express authority under Section 211 for the Commission to regulate the terms and conditions of carrier-to-carrier agreements.[54] In addition, MRC questions AT&T's claim that the conduit it will own would not be suitable and will not be used to build "local" facilities.[55]

29. FEA also expresses concerns involving conduit and pole lines. FEA asserts that, due to the Computer II decision and divestiture, the Department of Defense is having problems regarding interconnection of non-BOC provided CPE with BOC-owned on-post or on-base cable distribution systems. Service delays apparently have arisen in arranging for access to the BOC cable plant. FEA therefore requests the Commission to require the BOCs to provide OCCs and non-affiliated equipment suppliers with reasonable and non-discriminatory access to conduit and pole lines, particularly those on U.S. Government property.[56]

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[46] Supplemental Comments of GTE at 6–8.

[47] *Id.* at 3–4, 8–9.

[48] After the filing of the initial comments in this proceeding, Southern Pacific Communications Corp. (SPCC) was acquired by GTE and renamed GTE Sprint.

[49] Comments of GTE Sprint at 3, 4.

[50] *Id.* at 7.

[51] Further Comments of MRC at 8. MCI, GTE Sprint and SBS also express interest in the sharing of conduit. *See* Comments of MCI at 6–7; Comments of GTE Sprint at 4–5; Comments of SBS at 2.

[52] *See also* Comments of MCI at 6–7.

[53] Further Comments of MRC at 6–7.

[54] *Id.* at 7.

[55] *Id.* at 5–6.

[56] Further Comments of FEA at 3. Another concern raised by FEA involves the NSEP roles and responsibilities of AT&T's interexchange organization. Asserting that AT&T had not adequately explained how its interexchange organization will

30. MCI's additional comments focus on its continuing concerns regarding equal access. MCI suggests that we impose several additional conditions upon any grant of AT&T's application. First, it reiterates a recommendation it made in the access charge proceeding to establish a "benchmark" interconnection standard based on measurement data of interconnection arrangements with AT&T and requests that we condition any grant of the Section 214 application upon the BOCs compiling and reporting this data to the Commission by March 1, 1984. MCI further requests that we impose conditions requiring the operating companies to continue offering the present level of interconnection to other common carriers.[57]

31. IDCMA raises a new issue relating to AT&T's intent to assign all of Account 232 (of the Uniform System of Accounts) to the BOCs. It argues that the "station handling expenses" under that account should be assigned to AT&T along with the CPE to which it relates. If station handling expenses are permitted to be assigned to the BOCs, IDCMA reasons, AT&T will receive all CPE while the BOCs will be unfairly left with the responsibility for related unrecovered station handling costs such as costs of transporting CPE to customers' premises, installing it and initially testing it.[58] In addition, IDCMA expresses concern about AT&T's intent to provide end-to-end service and to act as its customers' agent in procuring services from the BOCs. Arguing that these offerings could perpetuate AT&T's competitive advantages by "foster[ing] the impression of a still-unified Bell system," IDCMA urges us to establish notice requirements to disclose the BOC's independence and nondiscrimination obligations and to establish disaggregated billing requirements.[59]

32. Two other parties, submitting comments for the first time, raise new issues. Stromberg-Carlson requests the Commission to require the operating companies to disclose the procedures by which they will conduct procurement after divestiture and note that this inquiry could serve as an alternative vehicle for resolving issues raised in Docket No. CC 80-53 (Bell System Procurement Practices).[60] Finally, California's comments focus on AT&T's draft model form of its Shared Network Facilities Agreement. California contends that the Agreement mandates a specific ratemaking treatment for expenses and revenues received in connection with shared multifunction facilities being used for intrastate traffic and argue that such ratemaking is properly left to state regulatory commissions.[61] It maintains that these expenses and revenues, which total billions of dollars, should not be excluded from the operating company's jurisdictional separations and settlement process, as it believes AT&T's Agreement provides.[62] California takes further issue with AT&T's proposed accounting treatment for these revenues and expenses.[63]

E. *AT&T Reply*

33. In its reply, AT&T again argues that many of issues raised in the comments go

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fulfill its NSEP responsibilities, FEA requests that we require AT&T to provide a current explanation of planned NSEP responsibilities and roles of various interexchange entities. *Id.* at 1–3.

[57] Comments of MCI at 3–4.

[58] Additional Comments of IDCMA at 5–8.

[59] *Id.* at 8–11.

[60] Comments of Stromberg-Carlson at 3.

[61] Comments of California at 1–2.

[62] *Id.* at 2–3.

[63] *Id.* at 3.

impermissibly beyond the scope of the supplementary material on which the parties were asked to comment.[64] Nonetheless, AT&T addresses these matters substantively, along with those issues that it did consider within the scope of this proceeding.[65]

34. Responding to FEA's request that AT&T discuss the planned NSEP responsibilities and roles of the AT&T interexchange entities, AT&T states that the AT&T government communications group will continue to perform all of its current NSEP functions, other than those BOC-related functions transferred to the CSO. AT&T notes that after divestitutre, the AT&T government group will continue to coordinate NSEP activities of all AT&T entities and provide a single AT&T point of contact. AT&T's Chief Executive Officer will continue to represent AT&T on the President's National Security Telecommunications Advisory Committee and set AT&T policy in NSEP matters.[66] AT&T responds to FEA's concerns regarding interconnection of non-BOC provided CPE with on-base cable distribution systems by noting that, in most situations, such "problems" are not NSEP matters and therefore the DOD will make interconnection arrangements directly with the BOC or other local carrier.[67] In addition, AT&T argues that the examples of service delays listed by FEA are not related to the MFJ; they are instead the result of the BOC's attempting to maximize the value of its existing cable facilities by arranging with the non-affiliated equipment vendor to continue to use those existing facilities.[68] Although not mentioned in FEA's comments, AT&T also discusses the impact that failure of a large tandem switching system would have upon NSEP performance. AT&T intially notes that since, in most situations, private line facilities are used for NSEP purposes, the failure of a system which is part of the public switched network would not affect NSEP functions. When, however, the failure involves a tandem switching system used as a backup by a government agency that performs NSEP functions, AT&T reiterates that there are several ways in which NSEP capabilities could be preserved.[69]

35. AT&T reiterates its argument that the sharing of conduit is not an equal access matter and that all AT&T will be doing is continuing to share the conduit it shared before divestiture. Therefore, according to AT&T, divestiture will have no effect upon MRC nor any third party with respect to conduit space.[70] Moreover, AT&T argues

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[64] These issues include, according to AT&T: operating company procurement practices, the assignment of Account 232 to the BOCs, limitations on AT&T's billing and marketing arrangements, and access charge matters.

[65] In a letter to the Chief, Common Carrier Bureau, dated September 9, 1983, AT&T responds to the BOCs' letter regarding additional costs. AT&T does not address the specific categories of costs listed in the BOCs' letter but takes issue with the BOCs' statement that these costs are eligible for recovery through access charges. AT&T asserts that issues as to what costs are recoverable should be resolved in tariff proceedings before the Commission and other regulatory agencies. The Chief, Common Carrier Bureau, wrote to AT&T on September 30, 1983, requesting comment on the additional costs listed in the BOC letter. AT&T responded on October 14, 1983, by clarifying the costs incuded in the consolidated application and asserting that these cost estimates were "fairly based and . . . represent AT&T's best determination of the costs that will be involved."

[66] *Id.* at 4–5.

[67] AT&T does note that when an "interconnection problem" does have NSEP implications, the CSO's government communications group will serve as a single point of contact for the DOD with the BOCs. *Id.* at 5 n.*

[68] *Id.* at 5–6.

[69] *Id.* at 7–9. In addition to the methods described in its July 29 submission, AT&T notes the possibility of "patching" around a failed tandem or maintaining spare capacity that bypasses the switch.

[70] *Id.* at 11.

that requiring the BOCs to make conduit available to all carriers would involve the costly building of additional facilities.[71] AT&T further notes that, contrary to MRC's assertion that conduit will be made available only to CATV distribution companies, the Bell System currently provides, and the BOCs will continue to provide, conduit space to interexchange carriers and other "legally qualified" entities.[72] Finally, AT&T states that the type of conduit it will own after divestiture is the type used merely to interconnect signal amplification equipment and is not suitable for use in building local facilities or for establishing local connecting links with customers, as MRC contends.[73]

36. In response to GTE Sprint's request that AT&T should be required to provide additional information concerning lease charges for shared facilities, AT&T argues that no additional information is necessary. Lease charges will be cost-based and calculated according to the methodology set forth in the Plan of Reorganization. AT&T asserts that a full explanation of this methodology already has been provided to the Commission in an appendix to the Shared Facilities Agreement.[74] AT&T further argues that GTE Sprint's request that other interexchange carriers be offered use of shared facilities at the same rates charged AT&T is based on a misunderstanding of the Shared Facilities Agreement. AT&T states that GTE Sprint has failed to distinguish between exchange access services and shared use of multifunction facilities. The Agreement does not, according to AT&T, involve the provision of services by the BOCs to AT&T but rather involves simply the sharing of multifunction facilities, a necessary transitional consequence of the divestiture.[75]

37. AT&T also rejects California's reading of the Agreement's terms and explains that the Agreement does not, as California asserts, mandate specific ratemaking treatment for lease expenses for shared facilities; it merely sets forth a methodology for allocating shared costs which is not binding on the Commission. Moreover, AT&T argues that the Agreement was supplied to the Commission as additional background information, not to obtain approval thereof.[76]

38. AT&T further objects to Stromberg-Carlson's proposal that the BOCs disclose procedures by which they intend to conduct procurement after divestiture. AT&T notes that the MFJ prohibits BOCs from discrimination in procuring products and services, and requires the BOCs to submit their procurement procedures to the Department of Justice within six months after divestiture. Since these procedures are still under development, AT&T sees no reason to disclose them now.

39. In response to IDCMA's argument regarding Account 232 station handling expenses, AT&T states that this issue has already been resolved against IDCMA by the district court after full briefing. The district court concluded that the Plan of Reorganization's assignment of all of Account 232 to the BOCs is consistent with the MFJ and is otherwise reasonable. Therefore, AT&T argues, granting IDCMA's request here would create a direct conflict with the MFJ. AT&T further contends that this Commission already considered and ordered capital recovery procedures for the entire Account 232 investment in Docket No. 79-105. AT&T adds that in any event it is not possible, on the basis of the BOC's accounting records and the Commission's accounts rules, to segregate these various handling costs.[77]

40. Finally, AT&T objects to the notice and billing requirements requested by

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[71] *Id.* at 11–12.

[72] *Id.* at 12–13.

[73] *Id.* at 13–14.

[74] *Id.* at 14.

[75] *Id.* at 14–16.

[76] *Id.* at 16–17.

[77] *Id.* at 24–28.

IDCMA, claiming that the request is based on the groundless fear that otherwise AT&T will be able to foster the impression of a still-unified system Bell system or of a privileged position vis-a-vis the BOCs. AT&T contends that this fear is unfounded in light of the massive media attention given the divestiture, the district court's restrictions on AT&T's use of the Bell name and logo, and AT&T's own advertising campaign to inform the public of the new, separate entity. Further, noting that AT&T must obtain a letter of authorization from the customer to order services for the customer from the BOC as an agent, AT&T argues that the customer will obviously be aware that AT&T and the BOCs are separate entities. AT&T concludes that IDCMA's proposals will only place unnecessary costs on ratepayers, while denying them the option to obtain end-to-end services after divestiture, and should therefore be rejected as contrary to the public interest.[78]

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[78] *Id.* at 28–30.

Regional Holding Companies
(as of December 31, 1981 – prior to reconfiguration)

Regional Holding Co.	*BOC Subsidiaries*	*States Served*	*Total Assets (in millions)*	*Newtork Access Lines*	*Employees*
NYNEX (Northeast Region)	New York Tel. Co.	N.Y.	$17,778.6	12,476,000	121,600
	New England Tel. and Tel Co.	Mass. N.H. Maine R.I. Vt. Conn.			
Bell Atlantic (Mid-Atlantic Region)	New Jersey Bell Tel Co.	N.J.	$17,267.3	13,722,000	108,103
	The Bell Tel. Co. of Pa.	Penn.			
	The Diamond State Tel. Co.	Del.			
	C&P Tel. Co. (Washington, D.C.)	D.C.			
	C&P Tel. Co. of Maryland	Md.			
	C&P Tel. Co. of Va.	Va.			
	C&P Tel. Co. of W. Va.	W.Va.			

Regional Holding Co.	*BOC Subsidiaries*	*States Served*	*Total Assets (in millions)*	*Network Access Lines*	*Employees*
BellSouth (Southeast Region)	Sourthern Bell Tel. & Tel. Co.	N.C. S.C. Georgia Fla.	$21,800.4	12,979,000	137,500
	South Central Bell Tel. Co.	Ken. Tenn. Miss. Ala. La.			
American Information Technologies (Ameritech) (Midwest Region)	Ill. Bell Tel. Co. Indiana Bell Tel. Co. Inc. Michigan Bell Tel. Co. The Ohio Bell Tel. Co. Wisconsin Tel. Co.	Ill. Indiana Mich. Ohio Wisc.	$17,038.4	13,971,000	112,978
Southwestern Bell Corporation (Southwest Region)	Southwestern Bell Tel. Co.	Ark. Kan. Mo. Okla. Texas	$15,949.3	9,781,000	97,600

Regional Holding Co.	BOC Subsidiaries	States Served	Total Assets (in millions)	Network Access Lines	Employees
U S West (Mountains and Great Plains Region)	Mountain States Tel. & Tel. Co.	Mont. Wyo. Col. N.M. Ariz. Utah Idaho	$16,109.1	10,438,000	104,900
	Northwestern Bell Tel. Co.	N.Dak. Minn. S.Dak. Neb. Iowa			
	Pacific Northwest Bell Tel. Co.	Wash. Ore.			
Pacific Telesis Group (Farwest Region)	The Pacific Tel. & Tel. Co.	Calif.	$16,573.4	10,429,000	114,700
	Bell Tel. Co. of Nevada	Nevada			

	A	B	C	D	E	F
Company	Capital Expenditures Network Reconfiguration (000)	Capital Expenditures Equal Access (000)	Total Capital Expenditures (000)	Expenses Network Reconfiguration (000)	Expenses Equal Access (000)	Total Expenses (000)
New England	2,160	46,200	48,360	550	26,400	26,950
New York	280	90,000	90,280	680	28,000	28,680
New Jersey	6,600	29,000	35,600	830	16,800	17,630
Pennsylvania	2,480	25,700	28,180	230	27,730	27,960
Ches. & Pot.	5,460	116,800	122,260	150	36,734	36,884
Southern	372	118,900	119,272	40	31,040	31,080
South Central	40	90,800	90,840	12	38,720	38,732
Ohio	16	10,700	10,716	4	16,410	16,414
Michigan	112	41,500	41,612	12	20,300	20,312
Indiana	184	47,800	47,984	270	15,850	16,120
Wisconsin	352	40,800	41,152	80	9,578	9,658
Illinois	3,232	54,000	57,232	760	27,400	28,160
Northwestern	800	86,300	87,100	24	29,000	29,024
Southwestern	1,800	144,900	146,700	160	73,200	73,360
Mountain	1,640	23,600	25,240	280	16,650	16,930
Pacific NW	2,100	23,400	25,500	280	11,300	11,580
Pacific	2,300	90,800	93,100	350	39,980	40,330

NOTE: These figures represent only the costs that applicants claim can be disaggregated.

CONCURRING STATEMENT
OF
CHAIRMAN MARK S. FOWLER

While I heartily endorse the rest of the Commission's decision, I am concurring with serious reservations in the portion addressing divestiture-related administrative costs and costs associated with network configuration. *See* paragraphs 124–126 and 176–177. I question both the policy and legal predicate of this aspect of the decision.

As I stated during discussion of this item, the Commission is on record in this order, in submissions to the district court and in other public pronouncements that it finds the overall divestiture framework to be in the public interest. Given this predicate, a finding as to the interstate jurisdiction that the class of administrative expenses associated with divestiture must be recovered wholly below-the-line raises serious policy questions. I also cannot reconcile our public interest assessment with questions raised in the order about whether the class of network configuration costs, resulting from divestiture requirements, are "reasonable and prudent" in the ratemaking context.

Furthermore, I am troubled with the legal basis for our decision on administrative expenses. The application here was filed under Section 214 of the Communications Act. Section 214 authorizes this Commission to approve the decision of a carrier to "acquire or operate" a "line, or extension thereof." It also governs our review of discontinuance of service. Technically, then, the application before us is for authorization of facilities' acquisitions, transfers and discontinuance.

In reviewing the application, we also take an action that is tantamount, in practical effect, to a disallowance, which ordinarily involves full hearing rights. While subsection 214(c) grants this Commission broad rights to condition facilities' authorizations, my view is that the Commission's action today as to the class of administrative expenses stretches the limits of subsection 214(c).

Customer Premises Equipment
Deregulation
Mobile Telephone Service

Commission adopted *Memorandum Opinion and Order on Reconsideration* requiring American Telephone and Telegraph Company to transfer embedded customer premises equipment used in mobile telephone service to AT&T Information Systems.
-AT&T Co.

FCC 83-598

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Deregulation of Mobile Customer Premises Equipment	CC Docket No. 83-372

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

(Adopted December 22, 1983 Released December 29, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. INTRODUCTION

1. We have before us an Emergency Petition for Reconsideration submitted by American Telephone and Telegraph Company (AT&T) on December 2, 1983 (AT&T Petition).[1] AT&T argues generally that there is no need to delay the detariffing of embedded mobile customer premises equipment (CPE),[2] that there is sufficient competition in the mobile CPE marketplace to support detariffing at this time, that continued tariffing after divestiture of the Bell System[3] would incur unwarranted costs associated with the establishment

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[1] AT&T also filed a Motion for Expedited Briefing Schedule on the same date. That motion was granted with modifications by the Chief, Common Carrier Bureau, acting under delegated authority. Deregulation of Mobile Customer Premises Equipment, CC Docket No. 83-372, Order, Mimeo No. 1233, 48 Fed. Reg. 55465 (released Dec. 6, 1983).

[2] For purposes of this proceeding, mobile CPE includes all equipment used in connection with services licensed under Part 22 of the Rules and Regulations of the Commission. These services are domestic public land mobile radio service (including airborne service), rural radio service, and offshore telecommunications service.

[3] The Bell Operating Companies (BOCs) will be divested from the Bell System as of January 1, 1984, in accordance with a decision rendered by the United States

and operation of an embedded base organization (EBO) for the embedded mobile equipment, and that AT&T would fully satisfy Commission concerns regarding the detariffing of this equipment by applying sale and price predictability requirements recently established by the Commission[4] to the embedded mobile equipment after its transfer to AT&T Information Systems (ATTIS).

2. For the reasons discussed in Part IV, *infra*, we shall grant the AT&T Petition, subject to the limitations and conditions we establish in this Order. As a result of our action in adopting this Order, AT&T shall be required to transfer embedded mobile CPE to ATTIS at the time of divestiture.

II. BACKGROUND

3. The Commission, in *Second Computer Inquiry*,[5] decided to exclude mobile CPE from the procedures established in that proceeding for the deregulation of telephone equipment.[6] This approach was taken in *Second Computer Inquiry* in part because the Commission was addressing the regulation of mobile CPE in a separate proceeding, *Cellular Communications Systems*.[7] In a subsequent action in that separate proceeding, we ordered that mobile telephone equipment used in connection with cellular systems must be deregulated. *Cellular Communications Systems*, CC Docket No. 79–318, Report and Order, 86 FCC 2d 469 (1981).

District Court for the District of Columbia in United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S.Ct. 1240 (1983).

[4] *See* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81–893, and American Telephone and Telegraph Company, Request for Approval To Supplement the Capitalization of AT&T Information Systems in Connection with the Transfers of Embedded Customer Premises Equipment, File No. ENF 83–18 (hereinafter CPE Detariffing Proceeding), Report and Order, FCC 83–551 (released Dec. 15, 1983) (hereinafter CPE Detariffing Order).

[5] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980) (Reconsideration Order), *further reconsideration*, 88 FCC 2d 512 (1981) (Further Reconsideration Order), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C.Cir. 1982), *cert. denied sub nom.* Louisana Pub. Serv. Comm'n v. FCC, 103 S.Ct. 2109 (1983).

[6] *See* Final Decision, 77 FCC 2d at 447 n.57; Reconsideration Order, 84 FCC 2d at 70; Further Reconsideration Order, 88 FCC 2d at 513 n.1.

[7] An Inquiry into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems, and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, CC Docket No. 79–318, Notice of Inquiry and Notice of Proposed Rulemaking, 78 FCC 2d 984 (1980), Report and Order, 86 FCC 2d 469 (1981), *reconsideration*, 89 FCC 2d 58, *further reconsideration*, 90 FCC 2d 571 (1982) (Cellular Communications Systems).

4. On April 7, 1983, we adopted a *Notice of Proposed Rulemaking* in this proceeding,[8] noting that "[a]t this point, the mobile telephone used in conventional common carrier mobile radio services constitutes the only piece of two-way voice terminal equipment that is accorded disparate treatment . . ." under *Second Computer Inquiry*. *Notice* at para. 3. We proposed to deregulate mobile telephone equipment, "thereby conforming our treatment of it with our treatment of all other CPE." *Id.* We also indicated that we would preempt state authority to the extent necessary to achieve this deregulation. *Id.*

5. Most parties filing comments regarding the *Notice* supported complete deregulation of mobile CPE. *See Deregulation of Mobile Customer premises Equipment*, CC Docket No. 83–372, Report and Order, FCC 83–507, 48 Fed. Reg. 54618, at para. 2 & n.3 (released Nov. 7, 1983) (hereinafter *Order*). Most commenters argued that the Commission should detariff mobile CPE on a bifurcated basis similar to the approach taken in *Second Computer Inquiry*. It was suggested that new mobile CPE could be detariffed as of January 1, 1984, while a transition period could be established for the detariffing of embedded mobile CPE. *See id.* at para. 5. AT&T, however, favored complete deregulation in one step, without any distinction between new and embedded equipment.[9]

6. In the *Order*, which we adopted on November 7, 1983, we decided to include mobile CPE within the general policies of *Second Computer Inquiry* and we preempted state authority to achieve this result. *Order* at para. 7. We also required that mobile CPE be detariffed on a phased basis; new mobile CPE would be detariffed as of January 1, 1984, but embedded CPE "will remain subject to tariff until the manner of detariffing it is determined." *Id.* at para. 9. We indicated that these determinations would be made in a separate proceeding.[10] We noted that the separate proceeding specifically

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[8] Deregulation of Mobile Customer Premises Equipment, CC Docket No. 83–372, Notice of Proposed Rulemaking, FCC 83–141, 48 Fed. Reg. 20952 (released Apr. 28, 1983) (hereinafter Notice).

[9] AT&T indicated that:

> The ambiguity surrounding the regulatory status of the equipment under consideration has made it difficult for some carriers to plan for the future. Accordingly, AT&T suggests that the Commission follow the approach taken in the Second Computer Inquiry and make deregulation of this CPE effective at some future date, (*e.g.*, January 1, 1984). This will enable carriers to develop their long range plans in a more certain environment.

AT&T Comments on Notice, June 6, 1983, at 3.

[10] The separate proceeding was instituted on the same date. *See* CPE Detariffing Proceeding, CC Docket No. 81–893, Further Notice of Proposed Rulemaking, FCC 83–506 (released Nov. 7, 1983) (hereinafter CPE Detariffing Further Notice). In that action, we sought comment regarding (1) the accounting methods which should be adopted for removing embedded mobile CPE from regulated books of account; (2) rules for valuing embedded mobile CPE to be removed from regulated

would resolve issues relating to capital recovery and accounting methodologies which had been raised by an Independent telephone company in commenting on the *Notice*. *Id.* at para. 10 n.9.

III. POSITIONS OF THE PARTIES

A. *AT&T Petition for Reconsideration*

7. In asking the Commission to reconsider its decision to delay the detariffing of embedded mobile CPE, AT&T makes the following arguments. First, there is no need for continued tariff regulation of this equipment. AT&T argues that the concern expressed in *Second Computer Inquiry* that CPE be disassociated from a carrier's utility service and removed from the separations process already has been satisfied with regard to embedded mobile CPE because this equipment has been excluded from the interstate jurisdictional separations allocation process. AT&T Petition at 4; *see* AT&T Reply Comments at 3. AT&T further argues that valuation issues relating to embedded mobile CPE can easily be resolved by applying the valuation principles established by the Commission in *CPE Detariffing Order*. AT&T endorses the valuation approach we followed in that proceeding. AT&T Petition at 4–5. AT&T also argues that bifurcation is unnecessary because there already is adequate competition in mobile telephone equipment, citing the number of manufacturers and suppliers of this equipment, AT&T's non-dominant position and its declining share of sales of this equipment, and the fact that Western Electric does not manufacture the mobile CPE currently in the embedded base. *Id.* at 6–7. AT&T also notes that, as a further guarantee, it "will apply its price predictability and sale program to this [embedded mobile] CPE in the same manner as approved by the FCC for AT&T embedded CPE" in *CPE Detariffing Order*. *Id.* at 7. This action by AT&T would begin immediately at the time of detariffing. *Id.*

8. Second, AT&T argues that "if embedded mobile CPE is not detariffed by the date of divestiture, AT&T will be required to create an embedded base operation to maintain this equipment under tariff." *Id.* at 8. AT&T estimates that $1.3 million in start-up costs and $2.3 million in annual incremental costs would be incurred as a result of establishing an EBO to maintain the embedded base for mobile CPE. *Id.*[11] AT&T further contends that costs under continued

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service; (3) the role of the states in establishing period for detariffing this equipment. CPE Detariffing Further Notice at para. 2. We tentatively concluded that December 31, 1987, should be the deadline for the complete detariffing of embedded mobile equipment. *Id.*

[11] AT&T asserts that these costs are not justified in view of the fact that the Bell System embedded base is comprised of only approximately 20,000 telephones nationwide. This means, according to AT&T, that the expense of maintaining an EBO for embedded mobile CPE would result in costs to be recovered from mobile

tariff regulation would increase with the decline in the size of the embedded base because the costs of the EBO organization would be spread over a diminishing number of customers. *Id.* at 9–10.

9. Third, AT&T maintains that we can detariff embedded mobile CPE offered by the Bell System as of January 1, 1984, and still go forward with our rulemaking to implement *Second Computer Inquiry* principles regarding this equipment. AT&T notes that "[d]uring the interim period [from January 1, 1984, until the completion of the implementation rulemaking proceedings] AT&T would agree to freeze the price of all embedded mobile CPE at existing tariff rates so that the Commission's final decision in that proceeding would not be prejudiced." *Id.* at 10–11.

B. *Comments*

10. Several parties filed comments regarding the AT&T Petition,[12] and none of the commenters addressing the issue object to the detariffing of Bell System embedded mobile equipment at the time of divestiture.[13] California indicates that it would not oppose immediate transfer of embedded mobile equipment to ATTIS if an appropriate sale and price predictability program were established. California Comments at 1. GTE argues that expedited detariffing should be limited to AT&T, favoring a transitional approach for other carriers which "would allow telephone companies which made investments under regulation to recover such investments under regulation." GTE Comments at 2–3. Telocator endorses the AT&T Petition and argues that embedded mobile CPE owned by radio common carriers also should be detariffed as of January 1, 1984. Telocator Comments at 2 *passim*. USTA does not oppose immediate detariffing in the case of AT&T, but "strongly opposes such a 'flashcut' scheme for the Independents." USTA Comments at 1.

IV. DISCUSSION

11. A common theme of our decisions in *Second Computer Inquiry* has been our view that tariff regulation of embedded customer premises equipment is no longer warranted.[14] We have further emphasized this view in *CPE Detariffing Order*, concluding

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CPE customers of approximately $115 more per mobile telephone annually compared to providing the CPE on a detariffed basis. AT&T Petition at 9.

[12] Comments were filed by People of the State of California and the Public Utilities Commission of the State of California (California), GTE Service Corporation (GTE), Telocator Network of America (Telocator), United States Telephone Association (USTA), and United Telephone System, Inc. (UTS).

[13] See California Comments at 1; GTE Comments at 2; Telocator Comments at 2; USTA Comments at 1. UTS takes no position regarding whether embedded mobile CPE should be transferred to ATTIS at the time of divestiture. UTS Comments at 1.

[14] *See* Final Decision, 77 FCC 2d at 388, 439, 441; Reconsideration Order, 84 FCC 2d at 65; Further Reconsideration Order, 88 FCC 2d at 513.

that "continued regulation of CPE is not necessary and in fact could impede the further growth of . . . competition."[15] We also have taken note of the fact that the divestiture of the Bell System has created special problems regarding the embedded CPE base of the Bell System and has made it important for us to attempt to resolve issues relating to this embedded base contemporaneously with divestiture.[16]

12. In addressing mobile CPE in this proceeding, we have concluded that "the provision of mobile telephone CPE should be deregulated." *Order* at para. 7. We also have noted that "there is no substantial reason to treat conventional mobile CPE differently from cellular and landline CPE." *Id.* We indicated in the *Order* that a primary reason for our delaying the detariffing of embedded CPE used in mobile service is "to afford the public the opportunity to comment on whether specific procedures proposed in Docket No. 81–893 should also be applied to embedded mobile CPE." *Id.* at para. 10 (footnote omitted). We adopted *CPE Detariffing Further Notice* in order to solicit public comment before resolving issues related to the embedded base used in mobile service.

13. Upon reviewing the AT&T Petition and other comments in this proceeding, we now are convinced that permitting AT&T to transfer embedded mobile CPE to ATTIS as of the date of divestiture will serve the public interest and will not in any way prejudice our further consideration of issues relating to this equipment in *CPE Detariffing Proceeding*. Under AT&T's proposal, which we are accepting to the extent reflected in this Order, valuation questions and issues relating to the terms and conditions of a sale and price predictability program for embedded mobile CPE will not be decided with any finality here, but rather will be decided in *CPE Detariffing Proceeding*. The fact that we now are permitting immediate transfer of this equipment to ATTIS will not have a bearing upon our subsequent resolution of these issues because our approval of the AT&T Petition does not in any way limit or constrict our authority to impose valuation requirements, to fix the duration of the price predictability period, to impose terms and conditions for the sale and lease of embedded mobile CPE during the transition period, and to address other matters relating to the deregulation of this equipment.[17]

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[15] CPE Detariffing Order at para. 3; *see* CPE Detariffing Proceeding, Notice of Proposed Rulemaking, FCC 83–181, 48 Fed. Reg. 29891, at para. 84 (released June 21, 1983) (hereinafter CPE Detariffing Notice).

[16] *See* CPE Detariffing Order at para. 6; CPE Detariffing Notice at para. 84.

[17] We have concluded that embedded mobile CPE provided by the Independent telephone companies shall not be affected by our action in this Order. There is no need to authorize or require the immediate detariffing of embedded mobile CPE provided by the Independents because this CPE is not affected by divestiture. Hence, the factors which make it advisable for us to permit AT&T to transfer

14. In short, ratepayers and current customers using embedded mobile CPE provided by the BOCs will not be disadvantaged by our action in this Order. Protecting the interests of ratepayers and in-place customers will be a major concern in our application of the principles of *Second Computer Inquiry* to this embedded mobile CPE in our subsequent proceeding. The protection of ratepayers and in-place customers during the interim period, before we complete action in that proceeding, is ensured by the fact that rates established in current state tariffs for embedded mobile CPE will remain in effect until we take such action. Thus, in-place customers will not be subject to any dislocation as a result of our authorizing the immediate transfer of this equipment to ATTIS.

15. We further conclude that the transfer of embedded mobile CPE to ATTIS at the time of divestiture will not have any adverse impact upon competition in the marketplace for this equipment. There is ample evidence that strong competition already exists for this equipment[18] and that AT&T does not command a dominant position regarding sales of this equipment.[19] This evidence argues in favor of expediting the detariffing of AT&T's embedded mobile equipment. Moreover, our subsequent action in *CPE Detariffing Proceeding* will provide us with an opportunity to fashion a transition to full deregulation of this equipment which ensures that competition will continue to be promoted. Throughout our proceed-

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embedded mobile CPE to ATTIS at the time of divestiture have no application to the Independents. Issues regarding the provision of embedded mobile CPE by the Independents will be resolved in our subsequent action in CPE Detariffing Proceeding. Further, AT&T notes that its Petition was not directed toward mobile CPE owned by the Independents. *See* AT&T Reply Comments at 2.

For similar reasons, we conclude that our action in this Order shall not apply to embedded mobile CPE owned by the radio common carriers. We reject Telocator's assertion that, since the radio common carriers generally have not participated in separations and settlements, "[t]his fact alone is sufficient justification for the flash-cut deregulation of [their] mobile CPE." Telocator Comments at 3. Our subsequent proceeding will address issues relating to the proper valuation of embedded mobile CPE and the establishment of transitional requirements which properly balance the interests of ratepayers, customers, and investors. In the case of the radio common carriers, there is no need to be deflected from our initial course of delaying the detariffing of embedded equipment until these issues are resolved. This is particularly true because divestiture, which has created exigencies warranting expedited action regarding mobile CPE owned by the Bell System, has no such impact upon the radio common carriers.

[18] AT&T has pointed out that "[t]here are at least twenty-five manufacturers of mobile CPE—including substantial firms such as General Electric, Motorola, NEC America, Hitachi and OKI Communications. . . ." AT&T Petition at 6; *see* People of the State of California and the Public Utilities Commission of the State of California Comments on Notice, June 2, 1983, at 1.

[19] AT&T's share of mobile CPE sales has been estimated to be 36.2 percent. AT&T Petition at 7.

ings regarding embedded CPE we have sought to extend to consumers the benefits of a competitive marketplace.[20] We are confident that our action in this Order, together with our subsequent action in resolving issues regarding embedded mobile CPE, will continue to foster the growth of competition regarding sales of this equipment.

16. In addition to the fact that ratepayers, in-place customers, and competition will not be harmed by the expedited transfer of embedded mobile CPE to ATTIS, we conclude that the impending Bell System divestiture creates an additional overriding justification for permitting this transfer to take place. As we have discussed,[21] divestiture has created special problems regarding the embedded base of the Bell System. The principal problem involves the fact that, in the absence of our intervening action, AT&T would be required to offer embedded CPE under tariff beginning in 1984 after this equipment is transferred from the BOCs in connection with divestiture. We have avoided this problem in the case of landline embedded CPE by establishing a transitional framework for the deregulation of this equipment. *See CPE Detariffing Order*.

17. Although we have authority to disapprove the transfer of embedded mobile CPE from the BOCs to AT&T, we do not need to exercise this authority here because we agree with the District Court in the divestiture proceeding that transferring this equipment to AT&T is consistent with the public interest. Our concern here involves devising the best means of implementing this transfer. If we were to fail to take action in this proceeding authorizing the immediate transfer of embedded mobile CPE to ATTIS, AT&T would be forced to establish an EBO to offer this equipment under tariff until we disposed of issues involving this equipment in *CPE Detariffing Proceeding*. We already have noted, in connection with our treatment of landline embedded CPE, that the establishment and operation of an EBO would generate substantial costs and that these costs would be borne by ratepayers. *CPE Detariffing Order* at para. 44. As we have indicated,[22] costs associated with setting up and operating an EBO for embedded mobile equipment also would be substantial, in relation to the amount of this equipment owned by the Bell System. AT&T has indicated that:

> To establish an embedded base organization for mobile CPE will necessarily involve a myriad of activities, most of which will involve professional personnel, or personnel with specialized expertise. Although it is difficult precisely to state all the activities needed to establish such an organization, those activities would include at least the following: negotiation of the billing, installation, maintenance and accounting contracts.

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[20] *See, e.g.*, CPE Detariffing Order at para. 217.

[21] See para. 11, *supra*.

[22] See para. 8 & n.11, *supra*.

AT&T Petition, Affidavit of Richard J. Lombardi, at 2. We conclude that the avoidance of these costs is sufficient reason for us to authorize the transfer of embedded mobile CPE to ATTIS at the time of divestiture, particularly since these costs would ultimately be borne by ratepayers, and such a transfer is consistent with the deregulatory goals we have pursued in *Second Computer Inquiry* and will not jeopardize the interests of ratepayers and in-place customers.

18. In summary, under our action in this Order, AT&T shall transfer to ATTIS at the time of divestiture embedded mobile CPE received from the BOCs as a result of the divestiture. This transfer shall be made at adjusted net book value, consistent with the principles we established in *CPE Detariffing Order*. ATTIS shall continue to lease this equipment to current customers at rates which are equivalent to state tariff rates currently in effect. These lease rates shall remain in effect until we take subsequent action in *CPE Detariffing Proceeding* to implement *Second Computer Inquiry* principles with regard to embedded mobile CPE. In that subsequent proceeding, we will make any further adjustments to net book value which are necessary in connection with the transfer of the embedded equipment (together with any other arrangements we consider necessary), and we will make any necessary adjustments in the sale program and price predictability period for this equipment, patterned after the action we have taken in *CPE Detariffing Order*. We also will address embedded mobile equipment owned by the Independent telephone companies and the radio common carriers, since that equipment is not affected by the action we are taking today.

19. We shall require the provisions of this Order to take effect on the day following the date of the release of this Order. The Administrative Procedure Act generally requires the effective date of rules to occur at least 30 days following publication in the *Federal Register*, but permits exceptions "as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. §553(d). We hereby find good cause for an earlier effective date to exist because of the need for the provisions of this Order to be in place a sufficient time before the divestiture of the Bell System.[23] Such an early effective date will assist in minimizing costs which otherwise would be generated by divestiture, and also will reduce uncertainty regarding the manner in which embedded mobile CPE will be provided during the period immediately following divestiture. AT&T, its customers, and state commissions need to know what ground rules will be in effect regarding embedded mobile CPE, and the urgent nature of this need justifies our providing for an early effective date for the action we are taking today.

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[23] We have made a similar finding with regard to actions we recently have taken which affect landline embedded CPE. CPE Detariffing Order at paras. 222–223.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED That, pursuant to Sections 4(i), 4(j), 201–205, 213, 218, 220, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§154(i), 154(j), 201–205, 213, 218, 220, 303(r), and 403, the policies, rules, and requirements set forth herein ARE ADOPTED, effective on the day following the date of the release of this Memorandum Opinion and Order.

21. IT IS FURTHER ORDERED, That the Secretary of the Commission shall provide for the publication of this Order in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Computer II
License Contract Agreements
Shared Administrative Services
Subsidiary Company

Report and Order adopted terminating the License Contract Inquiry and concluding that, with modifications, AT&T's accounting systems provide reasonable assurance that administrative services are provided to AT&T-Information Systems on a fully cost compensatory basis.

-AT&T Co.

CC Docket No. 80-742

FCC 83-601

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
License Contract Agreements and other Intrasystem Arrangements of the Major Telephone Systems	CC Docket No. 80-742
In the Matter of	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY	
Report on Services to be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology	Docket No. 20828

REPORT AND ORDER

(Adopted: December 22, 1983 Released: January 16, 1984)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *INTRODUCTION*

1. In this *Order* we consider two separate but related proceedings concerned with the provision of services by the major telephone companies to their affiliates.

2. We first consider the status of our inquiry into the license contract agreements, and other intrasystem arrangements utilized by the American Telephone and Telegraph Company (AT&T), General Telephone and Electronics Corp. (GTE), United Telecommunications, Inc. (United) and Continental Telephone Corp. (Continental). *License Contract Agreements and Other Intrasystem Arrange-*

ments of the Major Telephone Systems, (*License Contract Inquiry*), 84 FCC 2d 259 (1981). Under these agreements, a designated organization within each telephone system provides some services for all affiliates of the system. The *License Contract Inquiry* sought methods to ensure that carriers would incur only reasonable expenses, and that these expenses would be properly allocated between monoploy and competitive operations. We sought comment on the funding formulae, allocation of costs, methods of separating basic research from applied research, and impact of these agreements on competitive markets.

3. We next consider the impact of the *Modified Final Judgment* (*MFJ*)[1] and the *Computer II Inquiry* [2] on AT&T's provision of administrative services to its affiliates. In the *Further Reconsideration in the Second Computer Inquiry (Computer II),* we required that AT&T file a description of those administrative services which it planned to provide to AT&T Information Systems (ATTIS) its separate subsidiary formed to provide enhanced services and customer premises equipment. We also requested AT&T to include with this description an explanation as to how the costs of such services were to be allocated to the subsidiary. *Further Reconsideration* at 548–549. In response AT&T filed a *Report on Services to be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology* (*Report*).

4. The Commission considered and acted upon AT&T's *Report* in two subsequent orders, the *General Departments Order*, 90 FCC 2d 184 (1982) and the *Shared Services Order*, 92 FCC 2d 676 (1983), reconsideration granted in part, FCC 83–355, released July 29, 1983. These *Orders* define the extent of services which may be provided to AT&T Information Systems by AT&T and its affiliates. The *Orders* also establish certain accounting and reporting requirements on the part of AT&T and direct the Commission staff to monitor and report to the Commission concerning the effectiveness of the accounting system AT&T developed to account for the expenses of administrative services provided to ATTIS.

5. We conclude herein that the issues raised in the *License Contract Inquiry* have been, or will be, more appropriately addressed in other proceedings. In the interests of regulatory efficiency, and to avoid undue burdens to carriers, therefore, we terminate the *License Contract Inquiry*. We also review the attached Staff Report on Shared Administrative Services and adopt its findings and recom-

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[1] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2103 (1983).

mendations. We conclude that AT&T has provided services to ATTIS in a manner consistent with our decisions and that, with certain modifications, AT&T's accounting system provides a reasonable method of accounting for the costs of those services. We further recognize that changes in AT&T's corporate structure will require modifications to its previously filed *Report* concerning services to be provided ATTIS and we direct AT&T to file a supplement to the *Report.*

II. *License Contract Inquiry*

6. In the Notice of Inquiry initiating the *License Contract* proceeding we discussed at length the License Contract agreements between AT&T and the Bell Operating Companies (BOCs), and the similar agreements which exist between AT&T and AT&T's Long Lines Departments. We noted that the Bell System license contract expenditures "dwarf" those of other integrated telephone companies. Under the Bell System License Contract agreements, AT&T's General Departments provide advisory, supervisory and technical services to the BOCs. More specifically, the General Departments have provided the BOCs and Long Lines with (1) the right to use equipment under patents owned or controlled by AT&T and protection by AT&T against suits; (2) fundamental research and systems engineering (R&SE); and (3) financial, legal and technical advice and assistance, as well as other administrative services. Expenses incurred by AT&T in providing these license contract services are charged to the BOCs based on annual cost studies. Under the License Contract, charges to a BOC must not exceed a fixed percentage of that BOC's revenues. AT&T Long Lines has traditionally received the same services and is billed under the same annual cost studies.

7. The *License Contract Inquiry* is no longer the appropriate proceeding in which to review the contractual relationships between the General Departments and AT&T affiliates. The MFJ entered into by AT&T and the Department of Justice calls for "termination of the License Contracts between AT&T and the BOCs and other subsidiaries . . ." *MFJ* §I(A)3). In the *Plan of Reorganization* (*POR*) filed with the Court on Dec. 16, 1982 by AT&T and approved by the Court on August 5, 1983, AT&T stated that the License Contract would be terminated as of the date of divestiture, January 1, 1984, by means of termination agreements between the BOCs and AT&T. AT&T reports that work on agreements to terminate the License Contract, the Standard Supply Contract and the Cost Sharing Agreement is expected to be complete by the fourth quarter of 1983. *See* September 30, 1983 letter from Frank C. Minter, Assistant Comptroller, AT&T to the Chief, Common Carrier Bureau. We will review the scope of these successor agreements and take appropriate action in their regard as necessary. Furthermore, in our implementation of Computer II we are addressing AT&T's methods of

accounting for the costs of administrative services and research incurred by the General Departments and Bell Labs on behalf of ATTIS.

8. As discussed below, the *License Contract Inquiry* also was to determine whether procedures adopted with respect to the Bell System License Contract arrangements should apply to similar arrangements within GTE, United and Continental. With the termination of the AT&T License Contracts, the *License Contract Inquiry* no longer appears to provide a useful forum for consideration of the intercorporate arrangements of the other companies. (*See* below at paras. 13 through 16.)

9. When the BOCs are divested on January 1, 1984, the General Departments and associated accounting procedures will undergo substantial changes. At paragraph 32 we have instructed the staff to continue monitoring the General Departments accounting for administrative services to ensure that ratepayers are not billed for expenses that should be attributed to unregulated affiliates. In the process of monitoring those billings, the staff will review the classifications of, and billings for, all Bell Labs research and development. Finally, we have recently directed the Regional Bell Operating Companies to file with the Commission a report describing in detail the planned operations and support functions to be provided by the Central Service Organization to the BOCs and, if such are planned, to ATTIS.[3]

Monitoring Administrative Services and Fundamental Research

10. As noted above we have established limits on services which AT&T may provide to ATTIS, and directed the staff to monitor AT&T's implementation of the new expense accounting system.

11. The Staff Report on Shared Administrative Services (Staff Report) is attached to this *Order*. Based on this report, we conclude below that the General Departments' new accounting system adequately identifies the expenses of administrative service expenses which benefit ATTIS. With the introduction of certain modifications to the General Departments' accounting system, we are satisfied that AT&T's charges to ATTIS for these administrative services will be reasonable. In a November 16, 1983, letter from William R. Stump to the Chief of the Common Carrier Bureau, AT&T describes changes in its corporate structure that will occur on January 1, 1984. The General Departments will be replaced by a smaller Corporate Headquarters organization. AT&T states in its letter that all costs associated with this organization will be charged to AT&T affiliates

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[3] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, FCC 83-552, released December 30, 1983.

using procedures "similar or identical to procedures the Commission has approved in the course of the CI-II decisions."

12. Under Section 64.702(c)(4) of the Commission's Rules, ATTIS may engage in joint research and development efforts with its AT&T affiliates. AT&T however, chose to transfer to ATTIS all Bell Telephones Laboratories, Inc. (Bell Labs) employees engaged in enhanced services and CPE research and development. This greatly reduces the potential for misassignment of joint research and development expenses. In a companion item, the Commission has reviewed AT&T's allocation of fundamental research expenses to ATTIS. *Allocation of Fundamental Research Expenses*, ENF 83–14, adopted December 22, 1983. Therein, we adopt AT&T's proposal to bill post-divestiture fundamental research expenses based on a composite allocator. In addition, in that *Order* we have directed the staff to monitor AT&T's charges to ATTIS for such research.[4]

Independent Telephone Companies

13. In the *License Contract Inquiry*, we recognized that GTE, United, and Continental had service agreements that were comparable to the Bell System License Contract. Under the agreements used by these carriers, services such as legal, management and accounting assistance are provided centrally, costs are allocated to affiliated operating companies, and the allocated costs become part of each affiliated operating company's revenue requirement. We noted however that there were significant differences between the agreements of the independents and the Bell System License Contract. For example, AT&T's License Contract expenses are far greater than the corresponding expenses of the independent telephone companies. In addition, the independent telephone companies do not fund research and systems engineering through these agreements.

14. The scope of the *License Contract Inquiry* included the agreements of GTE, United, and Continental because of state and federal concerns over the increasing expense associated with the services provided under these contracts. *License Contract Inquiry* at para. 25. We noted, however, that our major focus would remain on

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[4] We note that while we have permitted AT&T to distribute 1982–83 expenses for some administrative services by means of the composite allocator, we decline, in a companion item, to permit use of the composite for fundamental research expenses incurred during that same period. We do not regard these decisions as inconsistent. AT&T uses the composite allocator to distribute only those expenses for which no alternate allocator is clearly available. AT&T applies a more precise allocator whenever possible. For example, personnel and medical services are distributed through the employee allocator and banking services are distributed through the total capital allocator. See Appendix A, Table I.* AT&T has also historically used a more precise allocator than the composite in distributing research costs. We patterned our requirement that fundamental research expenses for 1982–83 be distributed on the basis of non-fundamental research and systems engineering on AT&T's traditional method of allocating those expenses to the BOCs and to AT&T Communications.

the Bell System License Contract, and we sought comment on whether proposals affecting that agreement should be applied to independent telephone company agreements as well. *Id.*

15. More recently, we initiated a proceeding in order to address the appropriate regulatory treatment for embedded (regulated) customer premises equipment (CPE) owned by the independent telephone companies and to address the accounting by these companies for expenses associated with the provision of unregulated enhanced services and CPE.[5] In response to that Notice of Inquiry, several independent telephone companies, including GTE, United, and Continental, filed specific accounting proposals. We have recently adopted an *Order* in that proceeding permitting AT&T to transfer embedded CPE to ATTIS.[6] Therein we stated that in a subsequent action we would address accounting requirements for the independent companies in connection with their embedded CPE activities, the sale of CPE under regulation, and the valuation of CPE supporting assets transferred to unregulated activities.

16. In sum, as the preceding discussion indicates, there is no longer a reason for continuation of the *License Contract Inquiry.* The principal subject of the Inquiry, the Bell System License Contract, will be terminated shortly. We are addressing AT&T's administrative and research and development expenses in our review of AT&T's compliance with our Computer II rules and policies. Those proceedings are well suited for the resolution of any concerns that arise from arrangements that succeed the License Contract. Similarly, the *License Contract Inquiry* is no longer useful or necessary for consideration of similar arrangements of the independent telephone companies. The independents were originally included as subjects of the inquiry in order to determine if procedures adopted for the Bell System License Contract would also be applicable to the independent telephone companies. Cost allocation for the independents is now being addressed in the *Implementation Proceeding,* and will be covered in the revised Uniform System of Accounts, which we plan to implement in 1986. We will decide in the course of those proceedings whether further action with respect to the independents is necessary.[7] Accordingly, we will terminate the *License Contract Inquiry.*

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[5] This proceeding was initiated through the release of a Notice of Inquiry on April 13, 1982. Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81–893, Notice of Inquiry, 89 FCC 2d 694 (1982) (hereinafter Notice of Inquiry).

[6] Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Report and Order, FCC 83–551, released December 15, 1983 (hereinafter Implementation Proceeding).

[7] The Revision of the Uniform System of Accounts and Financial Reporting Requirements for Telephone Companies, 88 FCC 2d 83 (1981).

III. *STAFF REPORT ON SHARED ADMINISTRATIVE SERVICES*

17. The attached Staff Report reviews AT&T's provision of administrative services to its subsidiary, ATTIS. The report describes services provided to ATTIS by the General Departments and Bell Labs and analyzes AT&T's system of identification and accounting for the costs of services supporting ATTIS. The General Departments, which functions as AT&T's corporate headquarters, provides AT&T and its affiliates with a wide variety of services. Bell Labs is the primary research and development organization within the Bell System and does not normally provide administrative services to other AT&T affiliates. We have authorized Bell Labs to temporarily provide physical space and transitional support services to ATTIS.

18. In our Computer II decisions we permitted AT&T to furnish ATTIS with accounting, auditing, legal, personnel recruitment and management services, financial, tax, insurance and pension services. *Reconsideration* at para. 102. AT&T is obligated to ensure that such services are provided only on a cost compensatory basis. As noted earlier, we subsequently reviewed and in large part approved more detailed plans submitted to AT&T describing services to be provided and the methods to be used in accounting for ATTIS' share of their costs. We further directed the staff to monitor AT&T's implementation of its new accounting system.

19. Much of AT&T's administrative support to ATTIS is provided through the General Departments. Work in the General Departments is performed under both License Contract and non-License Contract agreements. Non-License Contract projects provide a direct product or service to participating companies, rather than the general advice and assistance provided under the License Contract. ATTIS is charged for its participation in non-License Contract projects by means of the same allocators and through the same accounting system used to charge other AT&T affiliates. AT&T, however, developed a new accounting system, the Activity Based Cost Billing System (ABBS), to ensure that ATTIS is charged its full share of the costs of License Contract services.

20. Bell Labs also provides administrative support to ATTIS. These services include tenant support services, such as medical and custodial services, in facilities which it shares with ATTIS pending completion of ATTIS' own research facility in December, 1985. Bell Labs also has provided training, education, employee recruitment and library services. The provision of many of these services has terminated or will shortly terminate. See Table III in the Appendix. Charges to ATTIS for such services are collected through Bell Labs' "case" system which establishes the authorization and billings for

costs by charging the individual services to defined programs of work.

21. The staff has reviewed AT&T's compliance with our *Orders* and the accounting procedures AT&T has employed to ensure that ATTIS provides reasonable compensation for the services it receives from other AT&T affiliates. In doing so, the staff familiarized itself with the regular and special accounting systems in the General Departments and at Bell Labs, reviewed internal and external audits and accompanying workpapers and interviewed AT&T managers and directors of departments. The staff ascertained the criteria used to identify work as properly performed and billed to ATTIS, reviewed the computation of the bills submitted to ATTIS and verified that ATTIS paid those charges in a timely fashion.

22. The staff has concluded that AT&T's accounting systems, in general provide for proper reimbursement for the costs of services provided to ATTIS. There are, however, certain segments of the accounting process to which we direct AT&T's further attention. Those areas include procedures used by AT&T to identify work which benefits ATTIS, procedures used to bill and ensure timely payment of bills by ATTIS and the calculation of allocators used in distributing expenses incurred for a service benefitting both ATTIS and other AT&T affiliates.

23. The staff concluded that all services benefitting ATTIS were properly identified at Bell Labs. Further, in the General Departments, License Contract services which benefit ATTIS as well as other affiliates are, with the exceptions noted in para. 24 below, also properly identified. AT&T's procedures for identification of License Contract services to be directly billed to ATTIS are less satisfactory. AT&T relies first, upon managerial decisions that work benefits ATTIS solely or primarily, and secondly, upon a complex system which requires that employees file exception time reports (ETRs) whenever they perform work outside their normal routines. Expenses are charged directly for projects which primarily benefit ATTIS and for work which employees perform under the ETR process. Few projects have been directly billed to ATTIS during the past year and managers appear to misinterpret the guidelines which AT&T issued regarding work to be directly charged to ATTIS. We have previously expressed our concern regarding direct billing to ATTIS and therefore we direct AT&T to obtain from its independent auditors, Coopers and Lybrand (Coopers), a further review of its system, including an examination of the ETR process, for purposes of determining whether AT&T's procedures have provided for all appropriate direct billing to ATTIS. On the basis of Coopers' review we will decide whether the budget decision package process is adequate in tracking the costs of direct services. We reserve judgment, therefore, and may require further modifications in AT&T's procedures. We also instruct AT&T to review all ETRs filed

by General Departments organizations and to issue bills within 30 days of the date of this *Order* for all work performed on behalf of ATTIS for which that company has not been billed. See Staff Report at paras. 31 and 60 through 64.

24. The staff has identified four projects in the legal department which were not identified by AT&T as services benefitting ATTIS. Those projects should be reclassified and ATTIS should be charged its appropriate share of their expenses to insure that ratepayers are not unduly burdened. See Staff Report at paras. 31 through 37.

25. AT&T's procedures permit affiliates to decide whether they will participate in non-License Contract cost-share projects. Many such projects provide an overall corporate benefit, and, therefore, permitting affiliates to decide whether they will share the costs is inappropriate. ATTIS' decisions regarding non-License Contract projects were not transmitted to the General Departments until May 1, June and July 1983. ATTIS thus received benefits from projects, many of which began in January, for which it paid no compensation until, at the earliest, September. We direct AT&T to revise its procedures to (a) eliminate the prior approval required for ATTIS participation in, and financial responsibility for, non-License Contract projects which provide clear corporate benefits to ATTIS and (b) to provide for billing for all non-license projects within 30 days of their initiation. See Staff Report at paras. 38 through 43.

26. The staff identified a number of bills for services to ATTIS which had been unpaid for more than 180 days. AT&T corrected this deficiency when the bills were brought to its attention. On December 1, 1983, AT&T began implementation of new billing procedures which provide for billing to ATTIS on the 1st of each month with payment due on or before the 15th day of that month. AT&T will apply a late payment charge to any bill not paid by the due date. We instruct AT&T to conduct a regular review of accounts receivable in order to ensure that late payment charges are consistently applied. See Staff Report at para. 66.

27. Finally, AT&T determines ATTIS' share of the expenses of License Contract services by applying an allocation factor to the total costs of those services which it has previously identified as supporting ATTIS. AT&T has included in the calculation of those allocators data for every Bell System affiliate, whether or not those affiliates pay a proportionate share of those License Contract expenses. The result of such calculations is to undercharge ATTIS and to shift the burden of costs onto the operating companies and eventually to the ratepayer. AT&T is directed to recalculate the allocators and the billings for 1982–83 using data only for the BOCs, Long Lines, CBI, SNET and ATTIS. See Staff Report at paras. 51 through 56. As noted below however, at the time of divestiture, AT&T will modify its accounting for services providing company-

wide benefits in a manner which should eliminate the flaw in its present method of distributing expenses to ATTIS.

Changes in AT&T Corporate Structure

28. AT&T has advised the Bureau, by letters dated November 16 and December 14, 1983, regarding certain structural changes which it will make on January 1, 1984. AT&T states that the General Departments will be eliminated and replaced, in part, by a Corporate Headquarters organization of approximately 1700 people whose operations will be limited to financial and policy activities. Expenses for these activities will be allocated to each of the AT&T entities, including AT&T Communications, Inc., the new corporation which replaces the Long Lines department. AT&T also states that, under a further restructuring, all unregulated activities will be under the direction of AT&T Technologies. Administrative services now provided by the General Departments will, in the future, be provided by AT&T Technologies, Corporate Headquarters and, to a lesser extent, AT&T Communications. Allocation procedures used to distribute expenses will be, according to AT&T, "similar or identical to procedures the Commission has approved in the course of the CI-II decisions."

29. AT&T's letters provide an overview of the services which will be provided by the Corporate Headquarters and by AT&T Technologies and AT&T Communications to ATTIS and the methods that will be used in accounting for them. With the reorganization of its Corporate Headquarters and of AT&T Technologies, we direct AT&T to file a detailed supplement to its earlier Report on Services to be Shared, including details of the accounting systems it will rely upon in allocating expenses to the several AT&T entities which will bear the costs. The supplement should also describe the structures of the Corporate Headquarters entity and of AT&T Technologies, the services each organization will provide, any revisions to the services now provided ATTIS by the General Departments, and an explanation as to how the new organizations comply with the Computer II separation requirements. Pending our analysis of this report we grant AT&T a temporary waiver to provide administrative services to ATTIS through AT&T Technologies, AT&T Communications and Corporate Headquarters.

Bell Labs Administrative Support to ATTIS

30. Bell Labs provides administrative services in addition to those provided by the General Departments. These services are primarily transition services and services associated with physical space that ATTIS temporarily shares with Bell Labs. Provision of these services will terminate when ATTIS occupies its own research and development facility. Construction of this building is scheduled for completion in December 1985. Table III attached to the Staff

Report lists the termination date for each service now provided to ATTIS by Bell Labs. The staff review at Bell Labs focused on verification that only authorized services were provided to ATTIS and on the billing and payment for such services. The staff concluded that Bell Labs has provided services to ATTIS in a manner consistent with our *Orders* and that ATTIS has compensated Bell Labs for these services in a timely fashion.

IV. *CONCLUSIONS AND ORDERING CLAUSES*

31. The public interest is best served when agencies ensure that their resources and those of the regulated industries are utilized with maximum efficiency. As discussed in detail above, the concerns which led us to open the *License Contract Inquiry* have been, or will be, more efficiently addressed in other, more carefully focused proceedings. We will therefore terminate the *License Contract Inquiry* and devote our resources to those areas where changing circumstances require our continued attention.

32. We have also concluded that AT&T's provision of administrative services to ATTIS comports with our decisions. AT&T's accounting systems, modified as we have described above, provide a proper system of accounting for the ATTIS share of the expenses associated with those services. We recognize, however, that AT&T's changing internal structure will result in modifications to these systems and to the services provided to ATTIS. We therefore charge the staff of the Common Carrier Bureau with continued monitoring of AT&T's provision of administrative services to ATTIS. The Bureau shall report to the Commission regarding AT&T's plans for providing services to affiliates under the unified accounting system described above in paragraphs 28 and 29.

33. Accordingly, IT IS ORDERED, That the License Contract Inquiry, CC Docket No. 80–742, IS TERMINATED.

34. IT IS FURTHER ORDERED, pursuant to Section 4(i) and (j) of the Communications Act, That the American Telephone and Telegraph Company shall take all actions set forth herein and shall file a report on its actions within 60 days of the release of this Order.

35. IT IS FURTHER ORDERED that the American Telephone and Telegraph Company shall file a report describing the organization and services of its newly formed Corporate Headquarters and AT&T Technologies entities and the manner in which the AT&T companies will receive these services and be charged for them no later than 60 days following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A (including Tables I through IV) - may be seen in

FCC Dockets Branch,
Room 230,
1919 M St., N.W.,
Washington, D.C. 20554.

STAFF REPORT ON SHARED ADMINISTRATIVE SERVICES

1. This is a report of the results of the review conducted by the Common Carrier Bureau staff of administrative support supplied by the American Telephone and Telegraph Company (AT&T) to AT&T Information Systems (ATTIS). ATTIS, formerly American Bell Inc., is a wholly owned subsidiary of AT&T engaged in the provision of customer premises equipment (CPE) and enhanced services on a detariffed basis. Its relationship to AT&T and to AT&T's other affiliates is subject to the requirements of Section 64.702 of the Commission's Rules.[1] The Computer II decisions permit AT&T to provide administrative services to ATTIS. AT&T is obligated to ensure that such services are provided only on a cost compensatory basis. *Final Decision* at para. 225; *reconsideration* at para. 102.

2. AT&T's principal lines of business are the provision of regulated communication services through the Bell Operating Companies (BOCs) and the Long Lines Department, the manufacture and marketing to retailers and wholesalers of telecommunications equipment by Western Electric Company (Western Electric), and the provision of CPE and enhanced services by ATTIS.[2] Two AT&T organizations, the corporate General Departments, and the Bell Telephone Laboratories (Bell Labs), primarily support the operations of other AT&T affiliates. The General Departments is AT&T's corporate headquarters, and provides strategic planning, advice, assistance, central development of operational systems, and other services for the AT&T subsidiaries. Bell Labs is the primary research and development arm of the Bell System.

3. The Commission has allowed the General Departments to provide a variety of administrative services to ATTIS under the condition that ATTIS bear the full cost of these services. The majority of General Departments expenses are funded through the

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 512 (1981), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[2] On January 1, 1984, AT&T will divest itself of the Bell Operating Companies, pursuant to the Modification of Final Judgment in United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

License Contract. Under the license contract agreement regulated affiliates pay a fixed percentage of license contract expenses. A portion of General Departments expenses are funded through non-license contract agreements. The BOCs, Long Lines and unregulated affiliates elect whether to participate in specific projects through various kinds of non-license agreements. Participants are billed a share of the costs.

4. ATTIS receives many of the services provided to other affiliates but is billed under a different accounting system than that used for other AT&T companies. Under the accounting plan AT&T filed with the Commission on January 13, 1982, the General Departments bills ATTIS directly for those administrative services that primarily or exclusively benefit ATTIS. The General Departments also allocate to ATTIS a share of the expenses associated with administrative services which are of overall corporate benefit, or which benefit both ATTIS and other affiliates. The staff reviewed the General Departments' accounting system in order to 1) verify that ATTIS receives only appropriate services; 2) verify that all work directly or partially benefitting ATTIS has been identified; 3) test whether the allocators used fairly represent ATTIS's share of the costs; and 4) verify that the bills are calculated properly, and rendered and paid in a timely fashion.

5. Bell Labs does not normally provide administrative services to other organizations. With the formation of ATTIS, however, a large number of Bell Labs technical employees were transferred to ATTIS. In order to facilitate this transfer, the Commission authorized Bell Labs to temporarily provide physical space and transitional services to ATTIS. On April 12, 1982, AT&T filed an accounting plan which governs Bell Labs' charges to ATTIS for these services. The staff reviewed Bell Lab's provision and billing of these services in order to verify that 1) only authorized services were provided, and 2) that Bell Labs bills ATTIS in accordance with the accounting plan.

6. This report is divided into four sections. The first section reviews the Commission actions which preceeded the staff review and describes the staff's methodology. The second section concentrates on the AT&T General Departments. This section addresses the identification of services provided to ATTIS, AT&T's calculation of allocators, and the cost collection and billing procedures. The third section reviews Bell Labs provision of administrative services to ATTIS. The final section contains a summary of staff recommendations.

I. *BACKGROUND AND METHODOLOGY*

A. *Background*

7. In the *Second Computer Inquiry* (*Computer II*) the Commission directed AT&T to file a description of the services which it would

provide to ATTIS, including an explanation as to how the costs of these services were to be allocated between regulated and unregulated activities. *Further Reconsideration in Computer II*, 88 FCC 2d 512, 548–549 (1981) (*Further Reconsideration*). In response, AT&T filed, on January 13, 1982 a *Report on Services to be Shared Between Fully Separated Subsidiary and Affiliated Companies and Associated Costing Methodology* (Report). In the Report AT&T proposed that a broad range of services be provided to ATTIS by AT&T affiliates, including the AT&T General Departments, the Administrative Services Department (ASD), the 195 Broadway Corporation, Long Lines, the twenty-two Bell Operating Companies, Western Electric and Bell Labs. The Commission considered and acted upon AT&T's report in two subsequent orders.

8. The majority of the services which AT&T proposed to provide to ATTIS were to be provided by the General Departments. The General Departments services provided to ATTIS include executive administration, public relations and advertising, employee information and research, human resources and personnel, pension and savings plan management, treasury, banking and investment assistance, auditing and actuarial work, financial, tax and legal advice, and medical research and planning. Table I in Appendix A*lists all categories of services provided by the General Departments to ATTIS. Provision of General Departments services began July 1, 1982. Bell Labs provides ATTIS with medical services and with tenant services in connection with the temporary colocation of ATTIS employees in Bell Labs facilities. Bell Labs commenced services to ATTIS on January 1, 1983. Table II in Appendix A*lists all services provided to ATTIS by Bell Labs and includes termination dates for each service.

9. In June 1982 the Commission approved in large part the General Departments' provision of services to ATTIS. *General Departments Order*, 90 FCC 2d 184 (1982). In December 1982, the Commission considered the remainder of AT&T's sharing proposals. *Shared Services Order*, 92 FCC 2d 676 (1983). In that proceeding, the Commission weighed the efficiencies to be gained by AT&T's provision of various services against countervailing regulatory considerations and, with some exceptions, rejected AT&T's request that other departments and affiliates provide support to ATTIS. The Commission directed the staff to monitor AT&T's implementation of its accounting system and to report its findings to the Commission. On reconsideration, the Commission permitted ATTIS employees to participate in computer courses offered by AT&T affiliates, provided those courses were made available on the same terms and conditions to parties outside the Bell system. *Shared Services Reconsideration*, FCC 83-355, released July 29, 1983.

10. The *General Departments Order*, the *Shared Services Order* and the *Shared Services Reconsideration* define the extent of

administrative support AT&T may provide to ATTIS. For a listing of these services, see Appendix A, Tables I and II.*[3] The orders also required that AT&T submit certain reports to the Commission.[4] AT&T, in the January 13 Report, stated that the accounting plans upon which it would rely provided adequate methods to assign both direct and indirect costs to ATTIS. Included as an appendix to the Report, however, was a letter from Coopers and Lybrand (Coopers), AT&T's outside auditors, indicating that the auditors were concerned about the impact of certain methodologies used in the new accounting system. Coopers' concerns included employee compliance with time-reporting procedures, whether the budget process properly identified charges which should be directly billed to individual companies, whether the calculation of the general expenses (overhead) loading rate included only costs related to services actually provided to ATTIS, and whether the method of allocating costs for services which benefitted ATTIS and other AT&T affiliates was satisfactory.

11. In the *General Departments Order* the Commission directed that AT&T obtain from Coopers a further review of the accounting system which would address each of the concerns raised in its preliminary analysis and indicate whether each had been satisfied. Because definitive conclusions regarding the accounting system could not be reached prior to the time the system became operational, the Bureau conditionally approved AT&T's plan to provide services to ATTIS beginning July 1, 1982. In November 1982 Coopers and Lybrand reported that its review of the Activity Based Cost Billing System for the quarter ending September 30, 1982 showed that no material adjustment was required in the accounting procedures for allocating General Departments costs between ATTIS and other affiliated entities of AT&T. *See* para. 33, *infra.*

B. *Monitoring and Auditing Methodology*

12. The staff's oversight focused on the following objectives: 1) To acquire familiarity with the operation of AT&T's accounting systems for services performed by the General Departments and Bell Labs, 2) to determine whether the General Departments and Bell Labs

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[3] ATTIS is also provided tenant support services such as maintenance and food service in facilities which it shares temporarily with the BOCs and in Western Electric's Denver plant where ATTIS engineer, design and development personnel are permanently located. The staff has conducted a preliminary review of the services provided at the Denver plant and will continue to monitor both the colocation at Denver and charges assessed ATTIS for space and tenant services. This report contains no analysis of the services provided by either the BOCs or by Western Electric.

[4] The Commission required that AT&T indicate for each category and subcategory of administrative services provided to ATTIS, the total expense for the period, the amount directly charged to ATTIS, and the amount allocated to ATTIS by means of one of the allocation factors.

accounting systems were adequate to identify and capture the costs of services provided to ATTIS, 3) to determine whether identified costs were billed to, and timely paid by, ATTIS, 4) to analyze the various allocators and to develop alternative suggestions for allocation, if appropriate, and 5) to identify areas requiring further Commission action.

13. In order to understand AT&T's accounting for administrative services, the Bureau staff reviewed the accounting systems described in AT&T's Report and amendments to it, met with members of AT&T's corporate accounting and internal auditing departments, and reviewed AT&T's internal audit report and the underlying audit workpapers. The staff also examined the workpapers underlying Coopers' November 1982 audit report in order to analyze the basis for Coopers' conclusion that its earlier concerns about the system had been satisfied. Throughout the course of the auditing process, the staff made many requests for clarifying material and documentation, which AT&T made available for examination at its Washington office.

14. Examination of the material provided by AT&T led the staff to conclude that on-site review at the General Departments and at Bell Labs was necessary in order to ascertain whether the procedures and internal controls described in AT&T's submissions operated effectively to capture ATTIS' share of the costs of administrative services.

15. The staff interviewed budget coordinators, managers and directors of departments, as well as non-managerial staff from 31 General Departments organizations located in New York and New Jersey. During these interviews the staff sought to ascertain the criteria used to identify and define activities benefitting ATTIS. Each organization's license and non-license projects were examined and discussed with departmental budget coordinators.

16. Staff auditors tested the computation and application of overhead loading rates and reviewed the procedures established to record employee time spent on service provided ATTIS. The staff also traced the computation of AT&T's allocators and verified that the true-up process specified by the accounting system was in effect and that the information used for true-up was current. Finally, the staff reviewed the billing procedures used to generate bills to ATTIS and examined audit trails to determine whether the bills were being paid in a timely fashion.

17. At Bell Labs the staff reviewed and analyzed the accounting procedures established to capture the costs of each service provided to ATTIS. Auditors visited Bell Labs facilities where services are provided to ATTIS and discussed the provision of services and accounting procedures with company representatives.

18. The staff auditors obtained Bell Labs worksheets showing the total amount billed ATTIS for services from January 1, 1983 through

July 1983. Bell Labs bills ATTIS on the basis of estimated costs for services and we compared the estimated amount for the period with the total amount of actual charges for the period. The staff selected for testing purposes the July 1983 billing amounts. The staff also tested return on investment (ROI), lease costs and landlord services, telecommunications and purchasing services. We reconciled the July bill to ATTIS to the amounts charged to Bell Labs cases for the period. Finally, we reconciled ATTIS billing and payment for July to the Accounts Receivable Ledger.

II. *ADMINISTRATIVE SERVICES PROVIDED BY THE GENERAL DEPARTMENTS*

A. *Identification of Services Provided to ATTIS*

19. The General Departments functions as AT&T's corporate headquarters. It is comprised of the Office of the Chairman of AT&T, the General Counsel and five executive vice presidents, and more than a dozen vice presidents and assistant vice presidents. Each vice president is responsible for a number of divisions, headed by division managers. The next lower level, district managers, report to division managers. Section managers report to district managers. ATTIS may not share in certain General Departments functions, including network services and marketing operations except for non-product specific advertising. Appendix A, Table I lists each service the General Departments may provide to ATTIS, the allocation factor used for distributing the costs of the work shared and a work description code (WDC) assigned to each service by the accounting department. The allocator and the WDC are discussed below.

2. *Budget Decision Packages and Categories of Work*

20. The Budget Decision Package (budget package) is the cornerstone of the General Departments' budgeting, accounting and billing processes. The General Departments Budget Manual defines a budget package as

> grouping of section activities, and their associated costs, necessary to achieve a single result or organizational purpose. Budget decision packages are the building blocks of the General Departments budget; organization budgets are obtained by adding together the budgets of all budget decision packages in the organization . . . ."

The definition of each budget package is important to both the establishment and the control of the budget since budget packages are utilized not only to structure the work of the General Departments but also to track and control costs.

21. AT&T developed the budget decision package process in the late 1970s when the General Departments adopted zero-based budgeting. The function of the budget package is to focus the budgeting process on the content and the purpose of the work rather

than on the organization performing it. There are an average of 3900 budget packages generated each year in the General Departments. A section may have any number of budget packages depending on its size, its function and the manner in which the section head chooses to define its work. Section managers are responsible for developing budget packages, which are reviewed by the division and used in presenting the departmental budget to higher levels of management. Revising and adding new budget packages during the year requires approval by the budget planning department.

22. All budget packages are classified as either License Contract or non-License Contract. The License Contract is an agreement between AT&T and the Bell Operating Companies that provides for centralized advice, assistance, and research from the General Departments and Bell Telephone Labs. Each operating company pays an allocated share of license contract costs, including a return of investment, up to a maximum of 2½ % of the total gross earnings of the licensee company. Long Lines also pays a share of these expenses and certain other affiliates pay small shares of the costs.

23. Work performed by the General Departments beyond the scope of the License Contract is performed under non-License Contract agreements. Non-License Contract projects are classified as Cost Sharing, Conduit and Other and expenses associated with these projects are charged against related budget packages. Cost Sharing projects are initiated by the various divisions within the General Departments and may involve joint bulk purchases, purchase of services ranging from human relations research to employee training programs, or central development of systems used to support telephone operations. Companies may choose whether to participate in a particular cost sharing project. Charges to participating companies are based on a variety of allocators, including units purchased, number of employees and number of participants. Conduit projects are those in which the General Departments, acting as the agent of an AT&T company or companies contracts with an outside vendor for a specific service. Retention of outside counsel for certain types of litigation is an example of a conduit project. The company receiving the service pays the entire cost of a conduit project. "Other" projects are those where work is performed by the General Departments upon request of an affiliate. Costs for such projects are directly billed to the company requesting the service.

3. *Identification of work benefitting ATTIS*

24. In order to implement the accounting plan AT&T filed with the Commission on Jan. 13, 1982, AT&T developed the Activity Based Cost Billing System (ABBS). This system governs the identification of work which benefits ATTIS, the calculation of allocators used to assign a portion of license contract costs to ATTIS, and the

calculation of administrative service bills sent to ATTIS. Details of the ABBS system are provided in Section II, below.

25. Since the budget package is the primary tool used to identify both License Contract and non-License Contract work benefitting ATTIS, the staff began this portion of its investigation by reviewing AT&T's budget manuals and the system letters, accounting instructions and shared service guidelines furnished to employees of the General Departments regarding the classification and establishment of budget packages. These documents were found to accurately reflect the Commission's orders governing the kinds of services which could be provided to ATTIS and the requirement that such services be provided only on a full cost reimbursable basis.

26. The accounting instructions provide that the costs of performing a service solely for ATTIS or for any other single affiliate must be separately collected and directly assigned to the responsible affiliate. Individual non-License Contract budget packages are to be established for each function to be directly assigned. The guidelines also provide adequate information regarding which services may and may not be provided to ATTIS. That information is the basis for managerial decisions regarding the classification of budget packages.

27. Staff review disclosed, however, that AT&T procedures place greater emphasis on preventing prohibited services from being included in the group of services billed to ATTIS than on guaranteeing that all services benefitting ATTIS are accounted for. For example, the AT&T *Shared Service Guidelines* provide that the initial decisions by the section heads and the division budget coordinators that a budget package represents a service which AT&T may provide to ATTIS are further reviewed by the Contract Administration Manager, in consultation with the legal department. The Contract Administrator makes the final determination whether a particular function as defined by the budget package, may be provided to ATTIS. There does not appear to be a comparably rigorous review of work classified by managers as not benefitting ATTIS. Rather, AT&T relies upon reviews by the internal auditors and on the Exception Time Reports, (ETRs) discussed below, as the primary methods for capturing the costs of services not previously identified by managers as supporting ATTIS.

4. *Internal and External Audits of Budget Packages*

28. Beginning in March 1982 and continuing through the summer of 1982, AT&T's Internal Auditors conducted a preliminary audit of the ABBS system. Much of their review took place before the system was fully operational and therefore treated the classification of budget packages only briefly. The internal auditors reported finding minor misclassifications of budget packages. The auditors advised the General Departments to reclassify those packages, but

concluded that those particular misclassifications would not significantly affect the bill rendered to ATTIS.

29. The audit performed by Coopers & Lybrand (Coopers) pursuant to the Commissions's *General Departments Order* was conducted in September 1982 and gave greater emphasis to whether the system captured all work which benefitted ATTIS. To accomplish this, the Coopers' staff reviewed 194 budget packages representing 50.7% of all License Contract expenses which had been classified as not benefitting ATTIS. Coopers found, as had the internal auditors, that various budget packages were incorrectly classified as not benefitting ATTIS. They reported however, that their testing of these budget packages indicated that the effect was immaterial both as to the nature and the amount of costs involved.[5] Coopers also found that budget packages were not always approved at the appropriate level and that adjustments which were made in the classification of budget packages did not automatically result in retroactive adjustment to bills.

30. It should be noted that Coopers did not address one issue it had raised in its January 13 letter to AT&T, that is, whether AT&T had established separate budget packages to permit and assure direct allocation of costs to ATTIS. Inasmuch as this issue was not addressed in Coopers' audit report as the Commission had requested in the *General Departments Order*, the staff recommends that AT&T be directed to obtain from Coopers a further review of the system for purposes of determining whether separate budget packages have been established where direct billing to ATTIS and/or other affiliates was appropriate. Commission decision regarding the adequacy of AT&T's procedures for directly billing ATTIS should await the results of Coopers' review.

5. *Staff Review of Identification of License Contract Work Benefitting ATTIS*

31. In March 1983 the Staff commenced a program of on-site monitoring of AT&T's arrangements for providing services to ATTIS. Attorneys, auditors and an economist worked in teams to interview AT&T managers at the Division, the District and the Section levels regarding procedures used to decide whether work benefits ATTIS. The staff also interviewed non-managerial employees to ascertain how procedures established at the managerial level were interpreted and implemented by subordinates. AT&T personnel interviewed included representatives from Comptrollers, Public Relations and Employee Information, Legal, Federal Regulatory and State Regulatory Matters, Labor Relations, Treasury and Planning

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[5] Coopers' standard for materiality is a less than 5% variation. In telephone matters, its standard is a 2% or less variation. Coopers' reports that it is "reasonably sure" that 2% was used in the ABBS audit.

and Financial Management departments of the General Departments. During the course of the interviews with section managers the staff reviewed the section's budget packages for 1982 and 1983, discussed the work of the section with its manager, inquired into the basis used for classifying the section's work as shared or not shared and discussed the section's relationship and contact points with ATTIS.

32. Managers reported that they relied primarily upon accounting instructions issued by the Comptrollers' department to revise budget packages, to identify projects which represented permissible services to ATTIS and to establish separate budget packages for services directly chargeable to ATTIS. The staff reviewed the accounting instructions and concluded that they provided appropriate guidelines for identifying permitted services and that, with the exception of certain budget packages in the Legal Department, managers were able to appropriately identify services which might be provided to ATTIS.

33. Discussions with employees however, again showed that greater attention was given to the elimination of impermissible sharing than to the identification of all work which benefitted ATTIS. For example, although the corporate instructions called for establishment of separate budget packages where the service either benefits ATTIS solely or is of only incidental benefit to other affiliates, few such separate budget packages were actually established. Managers tended to interpret the instructions to require a separate budget package only for work which was specifically requested by ATTIS and performed exclusively for its benefit. The impact of such decisions on charges for services would be appropriately addressed in the context of the recommended review of direct service billings by Coopers.

34. The staff concluded that, while in general, work was correctly classified, four budget packages in the Legal Department were incorrectly classified as providing no benefit to ATTIS. These budget packages are (Regulatory) #1110500, (Antitrust-MFJ) #1171201, (Antitrust Litigation) #1171Y00 and (Antitrust #1176Y00 and Regulatory Litigation Support).

35. The Regulatory project provides advice and assistance to the General Departments and associated company counsel on federal and state regulatory issues. Attorneys in this division prepare pleadings, motions, briefs and other documents, participate in hearings, and present oral arguments in proceedings before the Commission and federal courts. AT&T identifies this project as one providing no benefit to ATTIS. A separate budget package (#1110540) under the non-License Contract agreement was established for direct legal services, including regulatory services, to ATTIS. No expenses had been charged to this budget package as of July 1983. In October, after the staff had questioned AT&T

regarding its failure to bill ATTIS under this budget package, ATTIS was issued a bill for approximately $1.4 million representing charges for all direct legal services provided to it by the General Departments since January 1, 1983.

36. While ATTIS has now received a bill for direct legal advice and assistance, the staff recommends that AT&T be directed to include the Regulatory project in the pool of expenses which ATTIS must share with the regulated sector. Particularly during this transitional period, ATTIS' interests are affected by decisions made by regulatory bodies, both state and federal. The staff also notes that ATTIS had only twelve attorneys as of January 1983 and that managers throughout the General Departments reported that they regularly consulted the General Departments legal staff whenever a question arose regarding what they might and might not do for and with ATTIS. ATTIS should therefore bear a share of the costs of general regulatory guidance.

37. The Antitrust-MFJ project offers legal services and counsel, including research, advice and assistance to the General Departments and AT&T affiliates in implementation of the Modification of Final Judgment. The Antitrust Litigation project tracks all other antitrust suits in which AT&T is a party. ATTIS' interests, as a subsidiary of AT&T, are taken into account and are served by the resolution of such suits. A portion of expenses of both projects should be borne by ATTIS. The final budget package questioned by the staff covers litigation support to both regulatory and antitrust attorneys. This project covers such functions as document selection, maintenance and analysis, preparation of testimony, participation in court proceedings and assistance in the preparation of studies. This project provides support chiefly for the three projects previously discussed. It is reasonable therefore, that ATTIS pay a share of its costs as well as a share of the other three legal projects.

6. *Staff Review of Identification of Non-License Contract Projects*

38. Most of the services provided ATTIS by the General Departments are the same services performed for the regulated companies under the License Contract. Additional services are provided to both ATTIS and licensees under non-License Contract agreements, which AT&T categorizes as cost share projects, conduit projects and "other" projects. Non-License Contract projects provide a direct product or service to participating companies, rather than the general advice and assistance provided under the License Contract.

39. Cost share projects are just what the name implies. AT&T affiliates may elect, for example, to make joint purchase of goods, share in savings plan management or participate in management training programs. Participating companies share the costs of such projects. If the only costs incurred on a project are non-employee related, such as outside printing costs and consultants' fees, the

project is classified as conduit. "Other" projects are those performed solely for a particular company and for which it is directly billed.

40. License Contract and non-License Contract costs can be incurred on the same project. For example, the General Departments is responsible for originating and presenting to participating companies recommendations regarding employee training. The cost of developing such recommendations is borne under the License Contract. The costs of developing specific courses and the cost of training employees, however, if performed on a centralized basis by the General Departments, are borne, through cost share projects, by the companies who choose to participate in them.

41. The staff reviewed descriptions of all cost share and conduit projects offered by the General Departments in 1982 and 1983, examined details of those selected by ATTIS and concluded that, with the exception of institutional advertising, projects benefitting ATTIS had been appropriately identified.

42. Most of the advertising projects in the General Departments are funded through conduit projects with the payment going to third party advertising agencies. During its audit the staff asked for copies of conduit advertising projects chosen by ATTIS, and was told that ATTIS had not reached decisions in this area. The staff made repeated requests for this information and in mid-October received from AT&T descriptions of three advertising projects in which ATTIS has agreed to participate. Two of the non-License Contract projects, representing total expenses of six million dollars, involve support of the Bell exhibit at the Epcot Center at Disney World in Florida, while the third represents a ten million dollar expenditure for a general corporate advertising. The benefits which AT&T identifies in the project description sheets for these projects include "creation of a public climate conducive to sales" and the "encouragement of legislation and judicial decisions favorable to the company." Such promotion of company goals clearly represents an overall corporate benefit which should not be subject to affiliate approval regarding participation.

43. This example indicates that AT&T's procedures, which allow affiliates to select the non-License Contract projects in which they will participate, are not appropriate for certain classes of work. It is not possible for the Commission to anticipate other areas, in addition to advertising, where projects might be developed which serve similar corporate goals and inappropriately rely on ATTIS' approval before billing can commence. The staff recommends, therefore, that AT&T be directed to review all future conduit and cost share projects, to identify those projects designed to serve general corporate goals and to bill ATTIS for participation in those projects from their inception.

B. *The Allocation Process*

1. *AT&T Definition of Allocators*

44. Identification of budget packages which support both ATTIS' operations as well as the operations of other AT&T affiliates is the first step in allocating a portion of those costs to ATTIS. The next step in the distribution process is to identify budget packages which represent work done primarily for ATTIS benefit and to directly bill for such work under a non-License Contract agreement. As we have discussed above at para. 33, relatively few projects are directly billed to ATTIS. Nor do projects performed under cost share and conduit arrangements, the other non-License Contract funding sources, account for a significant portion of administrative service billings. ATTIS' share of expenses for most services provided by the General Departments is determined by dividing the expenses attributed to a particular service by one of the four allocation factors selected by AT&T.

45. The four allocators AT&T uses to calculate billings to ATTIS are described in AT&T's Report. The Employee allocator is calculated by dividing the number of ATTIS employees by the total number of employees of all Bell System companies. The Investment allocator is calculated as the investment of AT&T in ATTIS divided by the total investment of AT&T in all Bell System companies. The Total Capital allocator is calculated as the total capital of ATTIS divided by the total capital of all Bell System companies. The Composite allocator is calculated as the average of (1) assets, (2) expenses, and (3) employees of ATTIS divided by the total of each category for all Bell System companies.

46. The ABBS Procedures Manual issued October 25, 1982 by AT&T's Corporate Accounting Methods Department, furnishes the following definitions of the allocation bases:

1) *Employee Headcount* - Total number of active managment and non-management, full and part-time, regular and temporary (term) employees at end of period. Exclude occasional employees and employees on leave-of-absence.

2) *Average Investment* - AT&T's average investment in Long Lines Department and in capital stock (on an equity basis including common and preferred) of subsidiaries, and advances to subsidiaries, and retained earnings of subsidiaries.

3) *Average Total Capital* - Average Capital Stock, including amount paid in excess of par value, retained earnings, minority interest, long term debt (including unamortized premium or discount) short term debt and unamortized investment tax credits.

4) *Composite* - Simple average of each company's percentage relationship for employees, total operating expenses, and total assets.

47. Each allocator is in effect, a fraction, in which the figures for ATTIS form the numerator and figures for the total Bell System are the denominator. Since the number of ATTIS' employees, invest-

ment and capital are small in comparison to those of the Bell System, the resulting fraction is small and becomes smaller depending upon amounts included in the denominator. See, for example, footnote 6, below.

48. The ABBS Procedures define total Bell System entities to include: ATTIS, Bell Labs, Western Electric, AT&T International, the 195 Broadway Corporation, AMPS, AT&T Overseas Finance, Long Lines and License Companies including Southern New England, Cincinnati Bell, Malheur Home Telephone Company (a subsidiary of Mountain States Telephone & Telegraph), Empire City Subway (a subsidiary of N.Y. Telephone) and Bell Telephone of Nevada, (a subsidiary of Pacific Telephone & Telegraph).

49. The following table shows the percentages resulting from AT&T's calculations which were used to figure ATTIS' share of General Departments license contract costs for the period July 1, 1982 through September 30, 1983.

% of License Contract Costs Allocated to ATTIS

Allocator	*1982*	*Through July 30, 1983*	*After Aug. 1, 1983*[6]
Employee Headcount	.1157%	2.8993%	2.7697%
Average Investment	.1319	1.0782	.9642
Average Total Capital	.0751	.8787	.7712
Composite	.1393	3.2842	2.8356

50. The final step in the allocation process is to calculate the monthly bills by multiplying the appropriate allocator times the expenses recorded by AT&T for each license contract service for the month. The allocators are calculated using ATTIS forecast data. The bill issued for any month, therefore, is preliminary and does not become final until the books close the following year. AT&T completed recalculations of the 1982 bills using ATTIS actual data for the last six months of 1982 and rendered the trued-up bill to ATTIS. Table II in Appendix A* provides detail of General Departments billings for 1982 and for the first six months of 1983. The table also reflects the reduction of $54,734 which resulted from the 1982 true-up.

3. *Assignment of License Contract Expenses to Other Non-License Contract Affiliates*

51. AT&T's calculation of the allocators using figures for all AT&T affiliates assumes that each AT&T affiliate benefits from the License Contract services in proportion to its size. In a response from AT&T to the Bureau, dated February 22, 1983, AT&T stated that

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[6] The reduced percentages shown for August 1, 1983 reflect an internal AT&T reorganization. Certain consumer product development, market planning and wholesaling functions, and approximately 1500 employees associated with them, were transferred from ATTIS to Western Electric.

> . . . the work activities are an integral part of the headquarters functions of the AT&T enterprise as a whole, and are undertaken on behalf of all affiliates as a group. The work results in development of system corporate policies and plans, with necessary support from headquarters staff organizations responsible for corporate relationships with the public, governmental and regulatory agencies, customers, employees, and the financial community, along with required professional and technical support such as legal and accounting.

52. Furthermore, in describing the allocators, AT&T states that the allocators are based on the the ratio of ATTIS' employees, investment and capital to those "of all Bell System companies bearing the cost." AT&T Report at A-2. That statement can be fairly read to imply that a comparable formula was used to apportion costs of services to all AT&T companies. Nevertheless, that is not the way the system is designed to operate. In the same response referred to above AT&T states that, despite the assumed benefits to all affiliates,

> . . . At the present time, only ABI (ATTIS) is being billed under the Shared Administrative Service (SAS) concepts. ABI is paying its fair share of these corporate costs and, under SAS concepts, is sharing in a somewhat wider range of corporate activities and costs than are the other non-license affiliates. With the change in the structure of AT&T upon divestiture and the termination of the License Contract and Cost Sharing Agreement, the billing of AT&T Corporate activities will be extended to AT&T's other entities based on Shared Administrative Service concepts.

Since AT&T indicated that the process differs from that used for other affiliates, the staff reviewed the procedures used to bill other non-License Contract affiliates for License Contract expenses. We examined both the identification of services benefitting those affiliates and the procedures used to allocate costs to them.

53. Instructions issued by AT&T to General Departments managers require each department manager to identify work of a recurring nature that is primarily intended to benefit License Companies and Long Lines but which also benefits "Western Electric, Bell Laboratories, 195 Broadway Corporation, AT&T International and AMPS, Inc. etc." If a specific piece of work cannot be identified as a direct service to a particular company, managers are instructed to allocate the costs to these non-licensees. This instruction is comparable to that in the ABBS system which requires identification of projects benefitting ATTIS. However, the instruction for the other non-license companies also calls for managers to furnish the amounts to be allocated to each company together with a description and explanation of the procedures used to determine the amounts billable to the unregulated companies. This provides a greater degree of managerial discretion than the ABBS system which requires that the Contract Administrator identify the appropriate allocator for subcategories of work. A review of the allocators selected by the department heads shows a wide variety of allocators, including selective apportionment of employee time, allocations

based on percentages of employees or investment and a composite allocator developed by Corporate Accounting which has a totally different basis than the composite used for billing ATTIS. The same instruction letter informs departments that ATTIS is to be billed using the ABBS procedures. There is, however, no requirement that the allocators for services furnished to both ATTIS and to other non-licensees be consistent with one another. The risk of misallocation of costs arising from the use of different allocators is compounded by the fact that AT&T permits its managers to exercise a high level of discretion in their identification of projects whose costs will be shared with non-licensees other than ATTIS.

54. The staff found that managers in four of the six departments reviewed in this phase of the audit decided not to allocate to non-licensees the costs of certain projects which appeared to provide overall corporate benefits. For example, Public Affairs did not allocate to non-licensees expenses relating to review of legislation which could affect the entire AT&T system. The Advertising department chose not to assign to Western Electric a portion of the expenses devoted to institutional advertising, though Western is a participant in conduit institutional advertising projects and directly supplies CPE to retailers and wholesalers. Comptrollers considers budget and tax consolidation to be performed for an overall corporate purpose, but allocates no portion of the expenses to non-licensees. Similarly, the Legal department decided not to allocate to non-licensees any of the expenses of preparing and defending the consolidated Bell System tax return. The effect of such manageral decisions is to provide non-licensees with corporate support for which they pay nothing. This is inconsistent with the assumptions underlying the ABBS system and suggests the need for modifications in that system. For the reasons discussed below, the staff has concluded that the appropriate area for such modification is in the calculation of the allocators.

55. Each of the allocators used in the ABBS system to bill ATTIS is based on the size of the affiliates and therefore reflects an assumption that all affiliates benefit from General Departments administrative services in proportion to their size. Thus, there is the implication that Western Electric, Bell Labs and other sizable non-License Contract affiliates derive substantial benefits from those services. Had Bell Labs, Western Electric, AT&T International, 195 Broadway Corporation and AMPS been billed for License Contract expenses using the ABBS system, they would have borne a substantial share of those expenses.[7] Calculations using the ABBS system and AT&T preliminary 1982 data provide the following percentages

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[7] In addition, affiliates to which no License Contract expenses were attributed included AT&T Overseas Finance, Malheur Home Telephone Company and Empire City Subway. As discussed in para. 49 above, the data for these companies is factored into the determination of the ATTIS bill. The result is to increase

of License Contract costs which would be attributable to that group of affiliates if they had been using the same system as is used for billing ATTIS.

For services distributed by the employee allocator = 17.03%
" " " " " " investment = 9.07%
" " " " " " capital = 7.03%
" " " " " " composite = 15.30%

The actual billing to these non-Licensees were substantially below those amounts, and totalled only $14,300,167 in 1982, or approximately 1.6% of General Departments License Contract expenses for that year.[8]

56. Both the ABBS system and the accounting methods used to distribute License Contract costs to other affiliates purport to distribute a fair share of License Contract costs to AT&T affiliates. Yet the procedures used result in allocating to non-licensees other than ATTIS a smaller share of administrative service costs than would the ABBS system. In addition, AT&T, in computing the allocation ratios, includes data for a group of affiliates (identified in footnote 7) who pay no share whatsoever of License Contract costs. All License Contract costs not billed to ATTIS and to other non-licensees are paid for by the BOCs and Long Lines and are recovered from the ratepayers through tariff. It appears that ATTIS is being billed under the assumption that other unregulated companies benefit from license contract services in proportion to the rest of AT&T affiliates and the BOCs and Long Lines are billed under an assumption that the unregulated companies benefit only slightly. This inconsistency results in ATTIS being charged less than its fair share of the costs of service. The staff therefore recommends that all billings to ATTIS for License Contract services for 1983 be recalculated using only BOC, Long Lines, CBI, SNET and ATTIS data. In order to reflect the amounts attributable to other non-licensees, actual amounts paid by them should be subtracted from the expenses to be shared before the ABBS allocator is applied to those expenses. The effect of this recalculation will be to increase the billings to ATTIS by a relatively small amount since those entities whose data will remain in the calculation have the majority of AT&T's employees, investment and capital. The recalculation, however, will result in a more equitable distribution of costs than does the current calculation. In light of the fact that AT&T, in anticipation of divestiture, is in the process of revising its distribution of headquar-

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slightly the charges to the regulated companies while reducing ATTIS' share of expenses. Nonetheless, it does appear appropriate that these companies make a fair contribution for the services they receive.

[8] It is the staff's understanding that the assignment of License Contract expenses to these affiliates has not been the subject of internal audits.

ters cost to its affiliates in the future, the staff does not recomment recalculation of the bills sent to other non-licensees in 1983.

C. *Cost Collection and Billing*

1. *The Activity Based Cost Billing System (ABBS)*

57. Administrative services are budgeted and billed to ATTIS by recording expenses to both License Contract and non-License Contract budget packages. ATTIS is billed for its share of non-License Contract work through the same accounting system used for other AT&T affiliates. AT&T however, instituted a modified billing system, known as the Activity Based Cost Billing System (ABBS), to record and report ATTIS' share of License Contract services. Since most of the services provided by the General Departments fall under the License Contract category the staff directed particular attention to AT&T's new billing system.

58. The first step in establishing the ABBS system was to identify the work in each section which could be provided to ATTIS. AT&T directed section managers to review budget decision packages, and to separate out services which the Commission did not permit the General Departments to provide ATTIS. If a budget package represented both permissible and impermissible services, managers were directed to redraft the package and to develop new budget packages which separated from other section work activities that might be provided to ATTIS. The decisions of section managers regarding which projects benefitted ATTIS were reviewed and approved by the Budget Coordinator at the Division level. Fewer than 20% of the General Departments budget packages were identified as representing services which benefitted ATTIS during 1982–83.

59. The next step in the ABBS process is to assign a Work Description Code (WDC) which identifies the subcategory of work performed (See Appendix A, Table I, col. 3).*WDCs are recorded in the General History File, a computerized data base which contains the source data for all General Departments reporting systems. Each month, using the WDCs, cost data on shared services is extracted from the General History File. The monthly expenses are increased for departmental administrative loadings and general overhead loadings. An allocator is then applied to each loaded expense category to obtain ATTIS' share the cost of that particular service. (See Appendix A, Table I, col. 2).*

2. *Exception Time Reports*

60. The proper accounting for work performed for ATTIS' benefit depends not only on the proper classification of budget decision packages but also on the operation of the Exception Time Report (ETR) process. The salary of each employee in the General

Departments is preassigned to one or more budget packages, representing the projects to which he or she is assigned. If an employee works four or more hours in a workday on a project outside the normal assignment, an Exception Time Report (ETR) must be filed. The ETR is a form used by the accounting department to adjust the account to which the employee's salary is charged. In order to ensure the capture of all costs of service to ATTIS, the Commission directed AT&T to file ETRs for every hour or more of work that was performed for ATTIS. *General Departments Order* at para. 55. Unless General Departments employees file the appropriate ETRs, services performed by employees outside their normal routines will not be tracked or billed to ATTIS.

61. Coopers' November audit report, as well as AT&T's earlier internal audit, discuss the ETR process only briefly. Coopers stated that based upon its review, nothing came to the auditors' attention which indicated that the requirements of exception time reporting were not being met. Coopers noted that AT&T had adopted additional written procedures that emphasized to employees the need for proper reporting. Coopers also noted that AT&T had established a control log in the payroll department to facilitate follow up on rejected ETRs which had been returned to originating departments for correction. The Coopers auditors, however, because they conducted their audit shortly after ATTIS began operations, could only evaluate whether a process had been established that was theoretically adequate to capture work performed for ATTIS which should be recorded as exception time.

62. The staff has reviewed General Departments billings to ATTIS through August 1983 and has concluded that the ETR process has failed, at least in some instances, to generate bills in a timely fashion. Managers and their subordinates throughout the General Departments reported to the Commission staff that they file ETRs when they perform work for ATTIS. These employees maintained that the process was effective in capturing the costs of all such work. Filing of such ETRs should result in charging employee salaries and applicable overheads to separate budget packages established for projects which benefit ATTIS. The staff's review of General Departments billing for services to ATTIS through August 30, 1983 disclosed, however, that no bills have been issued for direct services by the legal department as discussed above, or by the public affairs departments even though the managers in each of these departments had stated that certain employees were engaged in work which was to be billed directly to ATTIS.

63. In response to staff inquiries, AT&T explained that though a department may have performed work under the ETR process for ATTIS' benefit, no billing can occur until ATTIS has formally authorized the work through a non-license contract project agreements. Such agreements may not take place for weeks or months

after the work has been initiated and actually performed. As a result of this internal requirement, the General Departments regularly performs work solely for ATTIS' benefit without any provision for timely billing for the service.

64. Such an arrangement would presumably be unacceptable for any other purchaser of goods or services which dealt with AT&T at arm's length and is equally unacceptable in the case of AT&T's separate subsidiary. The staff recommends that AT&T be directed to review all ETRs filed by General Departments organizations, to identify all work performed in behalf of ATTIS for which that company has not been billed, to issue such bills within 30 days of the date of the Commission's *Order* and to report to the Commission within 60 days of the *Order* regarding the amounts and dates of ATTIS' payments. The staff also recommends that the Commission direct AT&T that no work may be performed for ATTIS in the future unless there has been either prior authorization from ATTIS or an alternate provision established to permit timely billing.

3. *Billing Procedures*

65. The final step in the ABBS costing system is to assure that ATTIS is billed for and pays in a timely fashion for services rendered. The staff's audit disclosed some deficiencies in AT&T's billing system.

66. During the course of the on-site inspections, staff auditors reviewed the accounts receivable ledgers to verify that bills had been issued by AT&T for all services provided to ATTIS and that ATTIS issued payments on all invoices in a timely manner. Our testing conducted during July 1983 of the aged accounts receivable ledger showed that invoices for license contract services totalling $457,501 issued to ATTIS were more than 180 days old. The staff reported this finding to AT&T comptrollers who subsequently reported that, though ATTIS had issued checks in payment of the invoices in question, they had never been received by AT&T nor could they be located. AT&T also reported that payment had been stopped on the checks and new ones had been issued by ATTIS to replace them. The staff notes that AT&T, on December 1, 1983, began implementation of new billing procedures which provide for billing to all affiliates including ATTIS on the 1st of the month and for payment on or before the 15th of that same month. AT&T states that it plans to apply a late payment charge for any bill not paid by the due date. The staff recommends that AT&T be directed to conduct regular reviews of accounts receivable in order to ensure that all such payments are properly assessed.

67. In addition, review of AT&T's billings for non-License

Contract services disclosed that, through July 1983, no bills whatever were issued to ATTIS for such projects.[9] As noted, AT&T explained that this failure resulted from its decision that ATTIS managers should have the opportunity to approve participation in each cost share and conduit project. Since permanent managers did not assume their positions until January 1, 1983, no approval could have been issued until then. Moreover, the General Departments did not receive approval by the managers until May 1983. Absent these approvals, the General Departments could not bill ATTIS. AT&T reports that between August and October bills for the projects in question were issued to ATTIS. ATTIS' share of the expenses of these 45 projects totals approximately $2.6 million. Projects not billed until October included the three advertising projects discussed at para. 42 above whose budgets total $16 million.

68. The staff recommends that ATTIS's share in each cost share and conduit project in which it is identified as a participant be calculated from the date the project began. The staff also recommends that the cost of funds surcharge which constitutes one element of the bill for such projects be recalculated to reflect charges for use of funds for each month during which the project has run. The staff recommends that AT&T be directed to report to the Commission within 60 days of the date of this Order regarding billing to ATTIS for non-License Contract work.

IV. *SERVICES PROVIDED TO ATTIS BY BELL LABS*

69. During 1983, Bell Labs provided a variety of non-technical services to ATTIS. ATTIS is billed for these services in accordance with an accounting plan that AT&T filed with the Commission in the April 12, 1982 amendment to the january 13, 1982 Report. This plan covers Administrative, Facilities Support, and Transitional services provided by Bell Labs. The first group of services includes education and training, library, medical, and employment activities. Charges for these services are reported in AT&T's monthly Shared Administrative Service Reports.

70. The second group of Bell Labs services are Facilities Support Services, which includes the leasing to ATTIS of physical space at Bell Labs facilities, and related custodial and support services. According to AT&T, ATTIS' own facility will be ready for occupancy by December 1985. At that time, Bell Labs' provision of these services will terminate and ATTIS will assume the responsibility for

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[9] Non-License Contract services which were not billed included Institutional Advertising, Employee Information & Communications, Public & Employee Information, Employee Selection & Staffing Practices, Personnel Data Base Management, Budget Administration & Personnel Practices, Medical Research, Education & Systems Planning, Assistance to Telephone Pioneers, Work Relationship & Direct Guidance, AT&T Security Financial Filings and Corporate Insurance.

providing these services for itself. Bell Labs has also provided a third group of services to ATTIS on a transitional basis. The Commission recognized that AT&T would face problems in reassigning a large number of technical employees from Bell Labs to the newly formed ATTIS labs. Transitional services include purchasing, accounts payable, University & Technical Institute Relations, and use of the Bell Labs administrative computers. Facilities Support and Transitional services are provided pursuant to contracts filed with the Commission.

71. The staff conducted a limited review at Bell Labs in order to verify that only authorized services were provided, and that ATTIS was paying the bills for these services. The staff did not find any instances where Bell Labs was providing services to ATTIS that exceeded the Commission's authorization. Table III* lists all services provided to ATTIS by Bell Labs. Several of the services AT&T characterized as administrative, and most of the Transitional services, have now been terminated. Table III shows the actual or projected termination dates for each service. These termination dates are consistent with Commission orders. Table III* also shows the estimated 1983 billings for each of these services. The staff verified that monthly bills for these services have been rendered to ATTIS, and that ATTIS had paid these bills in a timely manner.

IV. *STAFF RECOMMENDATIONS*

72. As discussed in detail in the above report, the staff recommends that the Commission direct AT&T to take the following actions:

1) Obtain from its independent auditors, Coopers and Lybrand, a further review of the Activity Based Cost Billing System for purposes of (a) determining whether separate Budget Decision Packages have been established in all cases where direct billing to ATTIS and/or affiliates was appropriate, and (b) review of the process by which employees file Exception Time Reports (ETRs) and whether modifications in the ETR process is required in order to produce timely billing for services. See Paragraphs 31 and 60 through 64.

2) Reclassify Budget Decision Packages 1110500, 1171201, 1171Y00 and 1176Y00 as services for which ATTIS must be billed. See Paragraphs 31 through 37.

3) Review all ETRs filed by General Departments organizations and issue appropriate bills to ATTIS including a cost of funds surcharge for each month since the service was performed, and report to the Commission concerning the amounts of such billing within 60 days of the date of the Commission's Order. See Paragraphs 60 through 64.

4) Revise the procedures used to identify and bill for non-License Contract services which benefit ATTIS to provide for a) billing prior to ATTIS' approval for any project which provides an overall corporate benefit and b) billing for all projects, including those for which ATTIS provides approval, within 30 days of their initiation. AT&T should file a description of those revisions, including the standards to be used in identifying projects providing an overall corporate benefit, with the Commission. See Paragraphs 38 through 43.

5) Provide for monthly review of all General Departments' accounts due from ATTIS. See Paragraph 66.

6) Recalculate the allocators used in billing ATTIS for License Contract services to include only BOC, Long Lines, CBI, SNET and ATTIS data and report to the Commission on the results of that recalculation within 60 days of the date of the Commission's *Order*. See Paragraphs 51 through 56.

7) File Shared Administrative Service Reports on a monthly basis.

Competition Common Carriers
Common Carrier, Authorization
Common Carrier, Rates and Charges

Notice of Proposed Rulemaking adopted proposing to authorize AT&T's separate subsidiary to provide basic service via limited or unlimited resale.
-AT&T Co.

FCC 83–604

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY Provision of Basic Services Via Resale by Separate Subsidiary	CC Docket No. 83-1375

NOTICE OF PROPOSED RULEMAKING

(Adopted: December 22, 1983 Released: January 5, 1984)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *Introduction*

1. Pursuant to the Commission's orders in the *Second Computer Inquiry*,[1] American Telephone and Telegraph Company (AT&T) established a fully-separated subsidiary to provide unregulated enhanced services and customer-premises equipment. This subsidiary was known initially as American Bell Inc. (ABI); its current name is AT&T Information Systems (ATTIS). We ordered that this subsidiary must not own transmission facilities or provide common carrier (basic) services via resale. ATTIS can resell any service of any carrier to provide enhanced services.

2. In September 1982, AT&T petitioned this Commission in the *Competitive Carrier Rulemaking* [2] to allow ABI to provide basic, resold services without Section 203 tariff-filing requirements and

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[1] 77 FCC 2d 384, 474, *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Indus. Ass'n. v. Federal Communications Commission, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[2] AT&T Petition for Reconsideration in CC Docket No. 79–252 (Sept. 27, 1982). *See* 77 FCC 2d 308 (1979) (Notice), 85 FCC 2d 1 (1980) (First Report), 84 FCC 2d 445 (1981) (Further Notice), 91 FCC 2d 59 (1982) (Second Report), *reconsid.*, FCc 83–69

Section 214 entry-and-exit requirements. In January 1983, AT&T sought, via a letter for clarification of the *Second Computer Inquiry*,[3] to provide receive-only earth stations performing certain functions through its regulated interexchange carrier, AT&T Communications (ATCOM). The *Second Computer Inquiry* prohibited ATCOM from providing customer-premises equipment including receive-only earth stations,[4] except when a waiver is granted. AT&T claimed that there is a loss of efficiency when customers can acquire space-segment services from ATCOM but must turn to another supplier, including possibly ATTIS, for earth stations capable of receiving and performing network control or maintenance functions. ATCOM would have offered the receive-only earth stations under tariff, as opposed to their unregulated offering by ATTIS.[5] AT&T stated that consumers would benefit from allowing ATCOM to be a single-vendor supplier of "complete satellite network services." By order adopted today, we denied AT&T's request; we found that the bar on ATCOM does not prevent a service from being offered or impose unreasonable costs on consumers.[6] Nevertheless, it may be in the public interest to grant AT&T some relief along these lines, albeit not by waiver of the *Second Computer Inquiry* rules for receive-only earth stations.

3. In this proceeding we seek comments on the benefits and costs of allowing ATTIS to provide some basic, resold services. We seek to allow ATTIS to provide efficient, innovative offerings of basic, resold services themselves or basic, resold services in conjunction with enhanced services or customer-premises equipment in a manner that does not promote the acquisition and abuse of market power, cross-subsidies, or discrimination. This Notice presents three alternative proposals to allow ATTIS to provide basic services via resale. ATTIS may be allowed to resell as a basic service (1) any service supplied by an unaffiliated carrier (e.g., a carrier other than ATCOM); (2) services of any unaffiliated carrier and any *satellite* service supplied by an affiliated carrier (including ATCOM) as long as that service is available on an unbundled, nondiscriminatory basis (on the same terms and conditions to other users for interconnection, resale, and other use); or (3) services of any unaffiliated carrier and any service supplied by an affiliated carrier on an unbundled, nondiscriminatory basis. These proposals cover interstate domestic, international, and intrastate services. We also seek comments on treating ATTIS by

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(released March 21, 1983), 48 Fed. Reg. 46791 (October 14, 1983) (Third Report), 48 Fed. Reg. 52452 (November 18, 1983) (Fourth Report).

[3] Letter to Chief, Common Carrier Bureau from Alfred A. Green (January 19, 1983). We received comments from eleven parties on this letter and AT&T filed reply comments.

[4] *Supra* note 1, 84 FCC 2d at 70.

[5] Reply Comments of AT&T 3 (March 9, 1983).

[6] American Telephone and Telegraph Company: Request for Clarification of Computer II Requirements Concerning Earth Stations, ENF-83-15, FCC 83-603 (adopted December 22, 1983).

streamlined regulation or forbearance for its basic, resold, domestic, interstate, services.[7] Comments on a related proposal and other information helpful to this proceeding were sought by the Notice of Inquiry in *Long-Run Regulation of AT&T's Basic Domestic Interstate Services.*[8] We will incorporate comments from that proceeding in this one, and hereby seek additional comments on these specific proposals.

II. *Costs and Benefits of ATTIS Providing Basic Services Via Resale*

4. This section discusses possible costs and benefits from lifting the restriction on ATTIS providing basic services via resale. In the *Second Computer Inquiry*, we stated that AT&T's fully-separated subsidiary could not provide basic services because separation between regulated and unregulated activities would diminish opportunities for cross-subsidies and anticompetitive leverage.[9] We sought to reduce AT&T's ability to inflate the revenue requirements for its basic, regulated services with costs from enhanced services and customer-premises equipment. If rate regulation fails to detect such cost shifting and the carrier has market power,[10] customers of the carrier's basic services may pay unreasonably high rates. We also sought to reduce AT&T's ability to use market power in basic, regulated services to lessen competition in unregulated activities

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[7] Under forbearance as developed in the Competitive Carrier Rulemaking, *supra* note 2, basic, domestic, interstate resellers do not file tariffs, facilities applications, or reports on their facilities. Basic, domestic, interstate services supplied by resellers are subject to the other requirements of Title II of the Communications Act of 1934, including the requirement that rates charged be just, reasonable, and nondiscriminatory, and the complaint process. In the *Fourth Report*, we found that all domestic, interstate resellers not affiliated with AT&T should be treated by forbearance. Under streamlined regulation, carriers must file tariffs on fourteen-days notice, but do not have to file cost support with tariffs or requests for facilities authorization. As explained in Section III *infra*, we propose that basic, international, resold services supplied by ATTIS would be governed by full tariff and facilities regulation under Title II and would be subject to applicable provisions of the tariffs for the underlying services. We do not propose any unilateral action that would infringe on the sovereign prerogatives of our foreign partners in international telecommunications services. Basic, intrastate, resold services supplied by ATTIS would be subject to state regulation and applicable provisions of the tariffs for the underlying services.

[8] CC Docket No. 83–1147, 48 Fed. Reg. 51340 (November 8, 1983). In paragraph 44, 48 Fed. Reg. at 51348, we stated: "We need to consider whether we might authorize this subsidiary [ATTIS] to provide basic resale services treated by forbearance. If so, we might review AT&T's tariffs for the underlying services that are resold to ensure that the services are general and not tailored or with preferences for its subsidiary."

[9] *Supra* note 1, 77 FCC 2d at 463–64.

[10] The concept of market power is discussed in Competitive Carrier Rulemaking, *supra* note 2, 48 Fed. Reg. at 52454–56. We also discussed why a carrier lacking market power would find it unprofitable to engage in monopolistic, predatory, or discriminatory pricing.

through tying, discriminatory interconnections, or other exclusionary practices (leverage).

5. We first consider the possible benefits of ATTIS providing basic, resold services. Unless such benefits appear substantial, we would be reluctant to alter the range of ATTIS's activities established in the *Second Computer Inquiry*. We will look to the comments in this proceeding to evaluate the possible consumer benefits of resale for basic services by ATTIS. Lifting this ban may give ATTIS the ability to develop innovative, efficient combinations of basic services, customer-premises equipment, and enhanced services. With basic, resold services, ATTIS may be able to improve the quality and prices of services and products available to consumers and stimulate competition. For example, AT&T's letter and reply comments[11] describe benefits to consumers from a single vendor supplying satellite space-segment services and receive-only earth stations with network control or maintenance features. Single-vendor supply may decrease the cost of obtaining telecommunications services and equipment and increase the quality of their design, performance, and maintenace.[12] ATTIS may also develop innovative, efficient rate structures for basic services alone.

6. We now recognize that allowing ATTIS to provide basic, resold services does not necessarily threaten to increase cross-subsidies or anticompetitive leverage. In *Competitive Carrier Rulemaking*, we found that resellers lack power in the market of interstate, domestic, interexchange telecommunications services.[13] We did not address the market power of a reseller affiliated with ATCOM in that rulemaking,[14] and seek comments on this point. If ATTIS lacks market power, it seems that ATTIS would be unable to attract customers for basic, resold services that are priced unreasonably high. Nor would it be profitable for ATTIS to charge unreasonably low (predatory) prices or discriminatory prices. Under these conditions, we would not expect to have to perform frequent checks on cost allocations across ATTIS's regulated and unregulated activities to ensure that ATTIS's rates for common carrier services are just and reasonable; market forces would constrain ATTIS's rates. Even if

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[11] *Supra* notes 3 and 5.

[12] Under the Second Computer Inquiry, ATTIS and ATCOM cannot engage in joint marketing, installation, or maintenance. 47 C.F.R. §64.702(c)(2), (d)(1). In our order adopted today on AT&T's request to allow ATCOM to provide certain receive-only earth stations, we determined that denial of AT&T's request would not make a service unavailable and that possible consumer benefits would not outweigh possible harm from cross-subsidization and anticompetitive conduct. We did not conclude that there were no possible benefits from single-vendor AT&T supply. We propose to enable consumers to obtain at least some such benefits, to the extent that they exist, via services and equipment supplied by ATTIS.

[13] *Supra* note 2, 48 Fed. Reg. at 52460.

[14] *Supra* note 2, 91 FCC 2d at 73 n.37; FCC 83–69, at 8 n. 17.

ATTIS could successfully disguise costs of its unregulated activities as costs of its regulated services, without market power ATTIS could not profitably charge supracompetitive rates reflecting its inflated rate base. Then, ATTIS could not obtain monopoly revenues from its basic services to cross-subsidize its unregulated activities. Also, in the absence of market power, it could not exclude competition in enhanced services or customer-premises equipment by forcing consumers to take an unattractive bundle of its basic services and its unregulated products or services.

7. It is unlikely that ATTIS could use resale of the services of any unaffiliated carrier (e.g., a carrier other than ATCOM) to gain market power and thereby engage in undesirable cross-subsidization and anticompetitive leverage. We found in *Competitive Carrier Rulemaking* that most domestic, interstate, interexchange carriers unaffiliated with ATTIS lack market power.[15] For example, we determined that domestic satellite carriers (domsats) cannot profitably charge unreasonable rates for their services. Reselling a domsat's service would not give ATTIS the ability to charge an unreasonable rate for its service; ATTIS's rate would be checked by the underlying carrier's services and rates, actual or potential competition from other resellers of that carrier's service, and services from other satellite and terrestrial carriers. Nor would such resale give ATTIS the ability to force customers who want satellite services to obtain receive-only earth stations from ATTIS; customers could obtain satellite services from other domsat resellers or domsats and obtain equipment from other suppliers. In addition, ATTIS may lack sufficient power in enhanced services or customer-premises equipment to decrease competition in basic services through leverage.[16] Nevertheless, we would be concerned if ATTIS acquired for resale a large share of the domestic, interstate, interexchange capacity of unaffiliated carriers. This conduct could decrease competition between AT&T and other common carriers. Finally, we do not believe that allowing ATTIS to resell the domestic, interstate services of an unaffiliated carrier will increase discrimination in that carrier's rates.[17]

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[15] *Supra* note 2, 48 Fed. Reg. at 52460. We have not yet considered whether some domestic, interstate, interexchange carriers are non-dominant in Competitive Carrier Rulemaking. *Id.* at 52463. We would not view the absence of such findings as a reason to bar ATTIS from providing basic service by reselling services of any unaffiliated carrier. It is unlikely that ATTIS would acquire market power through resale of these carriers' services.

[16] *See* Second Computer Inquiry, *supra* note 1, 77 FCC 2d at 433 (supply of enhanced services is "truly competitive"); *id.* at 440 (competition in customer-premises equipment). *See also* Western Union Telegraph Co. v. Federal Communications Commission, 674 F.2d 160, 166–67 (2d Cir. 1982).

[17] Our decisions which declared resale restrictions unlawful and prescribed unlimited resale and shared use looked to resale as a means of eliminating discrimination across services in a carrier's rate structure. *See* Resale and Shared

8. Similarly, it is unlikely that ATTIS could obtain market power or promote discrimination through resale of exchange, intrastate, or international services supplied by an unaffiliated carrier. This includes services supplied by the Bell Operating Companies after divestiture (January 1, 1984). We have not analyzed relevant markets for these services and the power of resellers of these services in the *Competitive Carrier Rulemaking*. Yet ATTIS's share of any relevant market from resale of the exchange, intrastate, or international services of unaffiliated carriers will almost certainly be small. These carriers would not have an incentive to erect barriers to entry by other resellers competing with ATTIS, or to develop strategies by which ATTIS could acquire market power. Nor would they have an incentive to develop discriminatory rate structures favoring ATTIS.

9. We are more concerned about ATTIS's provision of basic services by resale of services of an affiliate (e.g., ATCOM) because of two possible strategies by AT&T. While we cannot say that these practices probably would develop or that regulation probably would be unable to detect and control them, we recognize possible costs in allowing such resale and the benefits of caution. First, suppose that ATCOM structured its service offerings so that ATTIS resold a large share of ATCOM's services and ATCOM supplied relatively little of its services to end-users and other resellers. Then, if ATCOM erected barriers to resale by others which are not eliminated by regulatory scrutiny, ATTIS might have market power.[18] Under these conditions and imperfect regulation of the cost basis of rates, ATTIS might be able to shift costs from its unregulated activities and profitably inflate rates to customers of its basic services. Also, ATTIS might be able to exclude competition in its unregulated activities through leverage. This strategy could defeat the purposes of and benefits from the structural separation ordered by the *Second Computer Inquiry*. Second, we are concerned that ATCOM would target certain service offerings for resale by ATTIS, and erect barriers to their resale by other carriers.[19] The Commission may have difficulty detecting and controlling all instances of such practices through

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Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167, 174–77 (1980); Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *reconsid.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* American Telephone and Telegraph Co. v. Federal Communications Commission, 572 F.2d 17 (2d Cir.) *cert. denied*, 439 U.S. 875 (1978).

[18] We are inquiring into ATCOM's market power in Long-Run Regulation of AT&T's Basic Domestic Interstate Services, supra note 8, 48 Fed. Reg. at 51349-50.

[19] One AT&T service appeared to be targeted for use by ABI, with tariff provisions such as a twelve-month notice requirement for terminations and excessive minimum usage charges which could discourage potential users and competition. *See* AT&T: Basic (Bell) Packet Switching Service (BPSS), 91 FCC 2d 1 (1982), FCC 83–221 (released May 26, 1983).

tariff review and the complaint process. ATCOM would have an incentive to discriminate against ATTIS's competitors. Also, this could lead to discrimination in AT&T's pricing for basic services, with some customers paying one rate for a service supplied by ATCOM and others paying another rate for the same service supplied by ATTIS.[20] Finally, we seek comments in this proceeding on the possible effects on ATTIS's power in international resale resulting from ATCOM's operating agreements with foreign carriers for international service.

III. *Proposals for ATTIS to Provide Basic Services Via Limited Resale*

10. We seek comments on the following three alternative proposals for ATTIS to provide basic services via resale. The proposals attempt to secure for consumers benefits from lifting this ban on ATTIS without substantial risk of undesirable cross-subsidization, exclusionary practices, and discrimination. If the Commission decides to give ATTIS authority to provide basic services via limited resale, we may subsequently propose broader resale in light of future market developments. We will rely on the record developed in this proceeding and in the Inquiry on AT&T to evaluate the costs and benefits of each proposal. We also seek comments on any conditions we should impose along with lifting the resale ban.

11. Under the most limited proposal, ATTIS would be able to provide basic services via resale only of any service supplied by an unaffiliated carrier (e.g., a carrier other than ATCOM). This would include all domestic and international services of such carriers, subject to the applicable provisions of the tariffs for the underlying services and state regulation. ATTIS could not resell services of carriers that provide service by reselling services of an ATTIS-affiliate and do not own transmission facilities. We propose that ATTIS be required to report annually to the Commission the names of the carriers supplying it services used in the provision of its basic services, and the amounts paid to each carrier for these services.

12. A second proposal expands the range of services available for resale by ATTIS beyond those services covered by the first proposal. Under the second proposal, ATTIS also would be able to provide basic, resold services via any satellite service supplied by an affiliated carrier (including ATCOM) as long as that service is available on an unbundled, nondiscriminatory basis to other users

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[20] Suppose that a carrier has an affiliated reseller, can largely limit certain service offerings to that reseller, and wants to charge some customers discriminatorily high or low rates. The carrier can achieve discrimination by serving some customers itself and having its affiliate serve others at different rates. Such resale may result in more, not less, discrimination in the carrier's rates. *See* note 17 *supra*. This result would be contrary to Section 202 of the Communications Act, 47 U.S.C. §202.

for interconnection, resale, and other use. Satellite services are basic services utilizing no terrestrial transmission lines; they include space segments and related switching and network-control facilities for basic services. Limiting such resale by ATTIS to ATCOM's satellite services reduces the concern about AT&T developing a strategy whereby ATTIS would gain market power. As we found in *Competitive Carrier Rulemaking*, satellite and terrestrial services compete.[21] Even if ATTIS resold all of ATCOM's satellite capacity, ATTIS probably would lack market power.[22] This limitation also confines the range of services in which there would be concern about greater incentive for discrimination by ATCOM. Resale of satellite services by ATTIS may yield the purported consumer benefits of single-vendor AT&T supply of "complete satellite network services" described in AT&T's letter and reply comments. As for unbundled, nondiscriminatory offerings, our order in *AT&T: Satellite Television Service*[23] explained why such offerings promote the public interest in just, reasonable, and nondiscriminatory rates and in competition. Under the *Second Computer Inquiry*, ATCOM must deal with ATTIS on a nondiscriminatory basis.[24] ATCOM must make its services available to ATTIS, other resellers, and other users on the same terms and conditions. Resale by ATTIS should not diminish the opportunities of other suppliers and users to interconnect customer-premises equipment with ATCOM's services or to use ATCOM's services in enhanced or basic services. In addition to the reporting described in para. 11, we propose that ATTIS be required to report annually to the Commission the services supplied by ATCOM to ATTIS used in the provision of ATTIS's basic services, and the amount paid to ATCOM by ATTIS for these services.

13. A third proposal would allow ATTIS to resell as a basic service any service of any carrier, including all of ATCOM's terrestrial and satellite services. ATCOM would make all its services available on an unbundled, nondiscriminatory basis. This proposal would eliminate possible inefficiencies caused by disparate treatment of ATCOM's terrestrial and satellite services, by disparate treatment of ATCOM's terrestrial services and services of other underlying carriers, and by restrictions on ATTIS's ability to offer interrelated products and services. There may be some benefits to consumers from unlimited resale compared with the range of resale

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[21] *Supra*, note 2, 48 Fed. Reg. at 52457-59.

[22] ATTIS would compete with ATCOM's terrestrial services and other providers of terrestrial and satellite services. We seek comments on ATTIS's prospective market power through such limited resale of ATCOM's services. *See* note 18 *supra*. In line with this second proposal, we would consider limiting resale by ATTIS to some set of ATCOM's services other than satellite services.

[23] 86 FCC 2d 18, 28 n.14 (1981). *See also* Long-Run Regulation of AT&T's Basic Domestic Interstate Services, *supra* note 8, 48 Fed. Reg. at 51344.

[24] *Supra* note 1, 77 FCC 2d at 474; 47 C.F.R. §64.702(c), (d).

allowed under the first or second proposal. However, this third proposal might be detrimental to consumers if ATTIS acquired market power, discrimination in common carrier services increased, or competition was impaired. We propose that ATTIS be required to file the same reports as described in the preceding paragraph.

14. We propose that ATTIS be subject to streamlined regulation or forbearance from tariff-filing and facilities-authorization requirements for its resold, domestic, interstate, basic services. Other obligations of Title II, including the requirement of just, reasonable, and nondiscrimintory rates and the complaint process, would apply to ATTIS's basic, resold services. Forbearance would be consistent with the treatment of non-dominant resellers in *Competitive Carrier Rulemaking.*[25] This treatment corresponds to our assumption that ATTIS will be unable to gain market power in basic services through the adopted proposal. On the other hand, streamlined regulation may be desirable because we lack experience with a provider of basic, resold services affiliated with ATCOM. We seek comments on the relative costs and benefits of streamlined regulation and forbearance applied to ATTIS's basic, resold services. ATTIS would be subject to full Title II tariff and facilities-authorization regulation for its basic, resold, international services, as well as applicable provisions of the tariffs for the underlying services. Finally, ATTIS would be subject to applicable state regulation for its basic, resold, intrastate services.

15. In conclusion, we here propose to lessen restrictions on AT&T, but seek to have no negative impact on the rates for common carrier services and competition. The major benefits are that consumers will have the option of procuring end-to-end service from an additional competitor, ATTIS, and that AT&T will be relieved of a burden not imposed on any of its competitors.[26]

IV. *Ordering Clauses*

16. This proceeding is instituted pursuant to the provisions contained in 47 U.S.C. §§154(i) and 403.

17. Comments must be filed on or before February 17, 1984. Reply comments will be due on or before March 26, 1984.

18. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex*

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[25] *Supra* note 2, 48 Fed. Reg. at 52461–62. In Competitive Carrier Rulemaking, *id.* at 52462, we discussed the application of tariff and facilities regulation to carriers with a mix of characteristics, some subject to forbearance (e.g., ATTIS's basic, domestic, interstate, resold services) and some subject to full or dominant regulation (e.g., ATTIS's basic, international, resold services). In the absence of two identifiable ATTIS carriers, if ATTIS chooses to provide both domestic-interstate and international basic, resold services, it would be treated by full regulation.

[26] The provisions of the Regulatory Flexibility Act do not apply to this rulemaking because AT&T is the only entity directly affected by our proposed action.

parte contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. §1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

19. In accordance with the provisions of 47 C.F.R. §1.419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C. 1919 M Street, N.W.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Broadcast Record, Past
Diversification of Control of Mass Media
Programming Specialized

Review Board affirmed grant of construction permit based on solid diversification preference, which overcame moderate comparative preference for ownership intergration, substantial past broadcast record preference, and slight auxiliary power preference. ALJ properly denied specialized programming issue. Limited weight given to ownership of weekly newspaper.
–Big Bend B/cers
BC Docket No. 82–559

FCC 83R–103

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BIG BEND BROADCASTERS Alpine, Texas	BC Docket No. 82–559 File No. BPH-810622AR
RIO GRANDE BROADCASTING COMPANY Alpine, Texas	BC Docket No. 82–560 File No. BPH-811130AV
For Construction Permit for New FM Station	

Appearances

Marvin J. Diamond and *Susan Wing*, on behalf of Big Bend Broadcasters; *Thomas Hendrickson*, on behalf of Rio Grande Broadcasting Company.

DECISION

(Adopted: December 23, 1983; Released: December 30, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Big Bend Broadcasters (Big Bend) and Rio Grande Broadcasting Company (Rio Grande) for authority to construct a new FM broadcast station to operate on Channel 224A at Alpine, Texas. By *Hearing Designation Order*, 47 Fed. Reg. 36284, published August 19,

1982, the applications were consolidated for hearing on a reporting issue against Big Bend and the standard comparative issue. The *Order* also permitted consideration under the comparative issue of the applicants' respective areas and populations coverage but this aspect of the issue was subsequently deleted by the presiding Judge. *See Order*, FCC 82M-3405, released October 29, 1982.

2. In an Initial Decision (I.D.), FCC 83D-37, released July 8, 1983, Administrative Law Judge Joseph Stirmer (ALJ) resolved the reporting issue in Big Bend's favor and held that Rio Grande was the preferable applicant under the comparative issue. Specifically, the ALJ awarded a substantial diversification preference to Rio Grande which he concluded was sufficient to outweigh the combined weight of several preferences awarded Big Bend under the heading of best practicable service. The proceeding is now before the Review Board on exceptions filed by Big Bend. We have reviewed the I.D. in light of the exceptions, Rio Grande's reply brief, the oral argument held November 10, 1983, and the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm his ultimate conclusion that a grant of Rio Grande's application will best serve the public interest.[1]

3. *Diversification of Control.* Alpine, whose 1980 population was 5,465, is located in an isolated, mountainous region of West Texas. Big Bend is the licensee of AM Station KVLF, the only broadcast station licensed to Alpine. I.D., para. 20. Rio Grande's two equal owners, William T. Beard, III and William L. Brooks, have a combined 59 1/6% ownership interest[2] in Far West Texas Publications, Inc., which publishes *The Alpine Avalanche*, a weekly newspaper serving Alpine. I.D., para. 10. The paper carries local news and advertisements but virtually no regional or national news and no "breaking news." Its 1982 circulation was 4850 copies. I.D., para. 22. Sul Ross State University, located in Alpine, irregularly publishes a college newspaper, *The Skyline*, which does not compete with *The Alpine Avalanche* for readers. I.D., para. 21. The ALJ awarded Rio Grande a substantial diversification preference because Big Bend is the licensee of the sole broadcast station in Alpine and stopped short of awarding an "overwhelming" preference only because Rio Grande controls (via the Beards) the local weekly newspaper. Big Bend excepts to this result and argues that neither applicant is entitled to a preference since each already owns a local medium of expression and, thus, neither will bring a new media voice to the community.

4. We agree with the ALJ that Rio Grande is entitled to a solid diversification preference. While we would reduce that preference

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[1] No exception has been taken to the ALJ's favorable resolution of the reporting issue; therefore, no further treatment of that issue is necessary. *See* Section 1.277(a) of the Rules, 47 CFR 1.277(a).

[2] Brooks owns 51 2/3% of the newspaper and Beard owns 7 1/2%.

somewhat to less than the substantial weight given by the ALJ, we nevertheless conclude that the preference is a significant one and, even if characterized as moderate, is the most important comparative factor in this case. To begin with, it is a consistently applied principle in our comparative cases that an applicant with no media holdings will be awarded at least a substantial preference over one who owns the only broadcast station in the proposed community of license. *See Brownfield Broadcasting Corp.*, 53 RR 2d 1175 (Rev. Bd. 1983); *KBBS, Inc.*, 91 FCC 2d 115, 52 RR 2d 105 (Rev. Bd. 1982); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 35 RR 2d 1637 (Rev. Bd. 1976). It is often emphasized in these cases that the winning applicant will be offering a "new voice" to the proposed community. *See Nuance Corp.*, 85 FCC 2d 412, 421, 49 RR 2d 147, 154 (Rev. Bd.), *rev. denied*, FCC 81–473, released October 7, 1981, *citing Associated Press* v. *United States*, 326 U.S. 1 (1945). Here, although Big Bend owns the only broadcast station in Alpine, the situation is not as compelling as in the cited cases because Rio Grande is the owner of a "small medium of expression," *The Alpine Avalanche*.[3] Nevertheless, a grant to Rio Grande would provide a first competitive broadcast voice to Alpine and avoid the creation of a broadcast monopoly. *See Multiplex Communications, Inc.*, 54 RR 2d 733 (Rev. Bd. 1983).

5. In its exceptions, Big Bend disputes both the factual and the legal significance attributed to *The Alpine Avalanche* by the ALJ. Thus, Big Bend argues that the ALJ understated the *Avalanche's* circulation and should have found it to be a more important medium than KVLF. We disagree. The ALJ correctly found at para. 46 of his I.D. that Big Bend's readership projections were not specifically supported because they were based on the use of a multiplier and pass-along rate rather than the number of copies distributed. While we would grant that the record supports a conclusion that the paper is widely read locally, a comparison of the number of persons reading it with those who may listen to KVLF begs the question. The pervasive impact in a small community of a full-time radio station which broadcasts seven days a week for approximately fifteen hours a day (see para. 11, *infra*) must be deemed more significant than the presence of a newspaper distributed once a week in that community.[4]

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[3] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909 (1965). While placing greatest emphasis on control of other interests in the proposed community of license, the *Policy Statement* notes that control of large regional interests "may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community." *Id.* Of course, no regional interests are present here but, by implication, an important local interest such as a full-time broadcast station would have considerably more weight than a small weekly newspaper.

[4] Also deficient is Big Bend's statement (Br. at 13) that a preference may not be

6. Big Bend also argues that the ALJ applied the wrong legal standard in weighing the importance of the applicants' respective media holdings. Again we disagree. The case authorities cited by Big Bend support only the proposition that the Commission will consider a non-daily circulation newspaper as a diversification factor, not that it will accord it anything close to equivalent weight with a broadcast station, as sought by Big Bend.[5] Big Bend's additional reliance in its brief and at oral argument on *Ram Enterprises* , 57 FCC 2d 844, 35 RR 2d 1507 (Rev. Bd. 1976), and *Bill Garrett Broadcasting Corp.* , 16 FCC 2d 415, 15 RR 2d 743 (1969), to diminish Rio Grande's preference is also unavailing because *Ram* turned on coverage factors which are not present here (see para. 1, *supra*) and *Garrett* involved the noncomparable facts of weighing seven regional broadcast stations and one newspaper against a single local daytime-only station.[6] And other cases, not cited by Big Bend, have also given relatively little weight to stockholder interests in local newspapers. *See Gilbert Broadcasting Corp.* , 91 FCC 2d 450, 469, 52 RR 2d 429, 444 (1982) (8% stockholder held management role in weekly newspaper); *Cannon's Point Broadcasting Co.* , 53 RR 2d 953, 958 (Rev. Bd.), *recon. denied* , FCC 83R-38, released May 13, 1983 (0.4% stockholder owned weekly newspaper serving nearby community); *Greater Wichita Telecasting, Inc.* , 90 FCC 2d 1046, 1049, 51 RR 2d 1604, 1606 (Rev. Bd.), *recon. denied* , 52 RR 2d 1357 (Rev. Bd. 1982) (1.6% limited partner owned 4.5% of monthly magazine); *Pleasant Broadcasting Co.* , 40 FCC 2d 582, 586, 27 RR 2d 257, 263–4 (Rev. Bd. 1973) (3% stockholder owned daily newspaper).

7. While it is clear from the foregoing discussion and case precedent that ownership of the only local broadcast station must outweigh ownership of a local weekly newspaper, no previous case apparently has presented identical facts. Alpine is a small, isolated community and, apart from an irregularly published college newspaper, has only KVLF and the *Avalanche* as local outlets of expression. In this context, the *Avalanche* is perhaps a more important medium

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awarded to Rio Grande without a remand to determine the relative market strength, as measured by advertising revenues, of the *Avalance* and KVLF. No case has been cited where such a comparison was deemed relevant. *See Policy Statement, supra* , 1 FCC 2d at 395, 5 RR 2d at 1909 (listing of pertinent considerations for determining media significance does not include advertising revenues).

[5] *Merrimack Valley Broadcasting, Inc.* , 92 FCC 2d 506, 517, 52 RR 2d 1210, 1218 (Rev. Bd. 1982) (very slight demerit awarded for monthly newspaper); *Colorado West Broadcasting, Inc.* , *supra* (weekly newspaper with small local distribution not a significant factor); *The News-Sun Broadcasting Co.* , 24 FCC 2d 770, 776 n. 14, 19 RR 2d 942, 952 n. 14 (Rev. Bd. 1970), *rev. denied* , 27 FCC 2d 61, 20 RR 2d 1084 (1971) (weekly newspaper interest "cannot be simply dismissed as having no significance whatsoever.").

[6] *Radio Greenbrier, Inc.* , 80 FCC 2d 107, 46 RR 2d 1467, *recon. denied* , 80 FCC 2d 140 (Rev. Bd. 1980), also cited by Big Bend, is equally inapposite because it involved a comparison of broadcast holdings in separate communities.

of expression than a weekly newspaper would normally be thought to be. Its emphasis on local news enhances its importance to Alpine. Accordingly, we believe that the substantial preference awarded by the ALJ to Rio Grande must be reduced somewhat. Nevertheless, to state the geographic isolation of and the impoverished media situation in Alpine is only to reemphasize the pervasive importance to that community of Big Bend's existing full-time AM broadcast station. Thus, Rio Grande must still be awarded a solid diversification preference.

8. *Integration of Ownership and Management* . Big Bend proposes that Gene Hendryx, its 55% owner, and Gene Ray Hendryx, Jr., its 12% owner, will work a minimum of 30 hours per week at the station as general manager and operations manager, respectively. Bill Hobbs, an 18% owner, will work 20 hours a week as sales manager. I.D., paras. 12–13. Rio Grande will integrate William Brooks as general manager for a minimum of 20 hours a week. For integration purposes, Brooks is a 33–⅓% owner.[7] I.D., paras. 3–4. Based on these quantitative differences and a finding that Big Bend is qualitatively better enhanced than Rio Grande, the ALJ awarded Big Bend a moderate preference. In its exceptions, Big Bend argues that its quantitative and qualitative superiority entitle it to a substantial preference.

9. We believe the ALJ's award of a moderate preference was correct. Although Big Bend stresses its numerical superiority (85% ownership integration versus 33-⅓%) and its "substantial" integration by its majority owners, factors which cannot be gainsaid, nevertheless, as the ALJ noted, Big Bend proposes no *full-time* integration. The Commission considers full-time participation by station owners to be a factor of substantial importance and reduces integration credit sharply as the time spent moves away from full time. *Policy Statement, supra* , 1 FCC 2d at 395, 5 RR 2d at 1909. Thus, we have consistently held, and the ALJ faithfully applied this precedent, that maximum integration credit will not be awarded where less than a majority of stock ownership is fully integrated. *See Communications Properties, Inc.* , 92 FCC 2d 45, 49, 52 RR 2d 981, 984 (Rev. Bd. 1982), and cases cited therein, *rev. denied* , FCC 83–320, released July 7, 1983. Big Bend's integration of 67% of its ownership 30 hours a week may be characterized as "substantial" but not full time. *See Webster-Baker Broadcasting Co.* , 88 FCC 2d 944, 953, 50 RR 2d 1142, 1149 (Rev. Bd. 1982); *Flint Family Radio, Inc.* , 69 FCC 2d 38, 41, 41 RR 2d 1155, 1159 (Rev. Bd. 1977). Accordingly, the ALJ's conclusion was correct.

10. *Past Broadcast Record* . By *Order* , FCC 82M-3726, released

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[7] Subsequent to the "B cut-off" date, Brooks increased his ownership to 50%, and the ALJ properly limited his credit to his ownership as of that date. *See* I.D., para. 51 and nn. 13, 16.

November 23, 1983, the ALJ ruled that Big Bend had made a sufficient threshold showing that its AM station KVLF had an unusually good broadcast record and would be permitted to adduce evidence of that record for comparative consideration. *See Gilbert Group, Inc.* , 49 RR 2d 1081 (1981). To establish its record, Big Bend submitted 1977 and 1980 composite week performance data for KVLF and 16 other similarly-sized stations within a 260-mile radius of Alpine. The ALJ found that in every non-entertainment category compared for 1980, KVLF performed at least 25% above the average of the other stations and also outperformed the others on an individual basis. The 1977 composite week comparison yielded a similar result. I.D., paras. 29–31. In addition, KVLF was found to have presented programming specifically designed to meet Alpine's needs and had received numerous awards and citations from the community. I.D., paras. 32, 34, 36. The ALJ concluded that although KVLF only operated the minimum number of hours required by the Commission and its performance did not significantly exceed the promises made in its latest renewal application, its past record was unusually good and entitled it to a preference.[8]

11. Big Bend excepts to the ALJ's failure to conclude that KVLF's record entitles it to a substantial preference. We agree with this objection because the areas in which the ALJ faulted KVLF do not seem to us to detract from its overall record. First, with regard to its hours, KVLF regularly operates from 7 a.m. to 10 p.m., or 15 hours a day, which is 3 hours more than the minimum required for an unlimited time AM station. *See* Section 73.1740(a) of the Rules, 47 CFR 73.1740(a). Occasionally it operates considerably longer hours in order to cover special stories. Big Bend Exh. 19. Thus, the fact that it normally leaves the air at 10 p.m., which, as Rio Grand points outs, is the earliest time permissible under the aforenoted rule, does not by itself mean it is only in minimal compliance with the rules, as the ALJ stated. Second, the fact that KVLF's performance only slightly exceeded its promises does not diminish its outstanding record. Thus, its 38% total non-entertainment programming, while only slightly above the 37.6% promised (Big Bend Exhs. 16, 17), nevertheless constituted a considerable part of its composite broadcast week and was 39% above the average for the comparable stations. Likewise, its public affairs programming was 89% above the average; its news, 25% above; and its "all other" programming, 38% above. Individually, KVLF ranked second (out of 16) in the "all other" and public affairs categories, third in total non-entertainment, and fourth in news. Big Bend Exh. 12. These are uniformly impressive statistics.

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[8] Although the ALJ did not quantify this preference in his findings and conclusions under the past broadcast record issue, it is clear from language in the I.D.'s overall summary paragraph 58 that the preference was less than substantial: ". . . while Big Bend has been awarded a larger number of preferences, none of them is substantial . . . ."

Moreover, KVLF has presented numerous programs responsive to identified community needs as elicited in its on-going ascertainment contacts. Big Bend Exh. 20. It also has broadcast significant amounts of Spanish-language programming to Alpine, a community with a 47% Hispanic population. Big Bend Exh. 21; I.D., n. 7. Finally, as KVLF's many awards, citations, and letters of thanks attest, the station has been particularly well regarded by those in the best position to judge its programming—its regular listeners, the Alpine community, and its civic associations. For all these reasons, we conclude that KVLF has shown the requisite "unusual attention to the public's needs and interests," and that Big Bend therefore is entitled to a substantial preference. *See Policy Statement supra* , 1 FCC 2d at 308, 5 RR 2d at 1912; *cf. WABZ* , *Inc.* , 90 FCC 2d 818, 840–842, 51 RR 2d 1507, 1525–7 (1982); *Broadcast Communications, Inc.* , 53 RR 2d 805, 809–11 (Rev. Bd. 1983).

12. *Auxiliary Power* . The ALJ awarded Big Bend a slight preference for proposing to use auxiliary power at both its transmitter site and its studios. In its exceptions, Big Bend argues that its preference should be elevated to substantial because its dual auxiliary power source proposal will permit it to resume broadcasting "instantly" in the event of one of Alpine's frequent power failures. We disagree. Although a proposal to use auxiliary power is a public interest factor, *see Addendum to Policy Statement on Comparative Broadcast Hearings* , 2 FCC 2d 667, 6 RR 2d 861 (1966), it "is intrinsically of less significance than other aspects of the comparative analysis." *WVOC, Inc.* , 45 FCC 2d 420, 424, 29 RR 2d 893, 899 (Rev. Bd. 1974). Therefore, and despite Big Bend's suggestion to the contrary, we have consistently accorded such a proposal only minor weight. *See, e.g., Communications Properties, Inc., supra* , 92 FCC 2d at 50, 52 RR 2d at 984; *Bradley, Hand and Triplett* , 89 FCC 2d 657, 664, 51 RR 2d 383, 388 (Rev. Bd. 1982); *Barnes Enterprises, Inc.* , 69 FCC 2d 1957, 1963, 44 RR 2d 1351, 1358 (Rev. Bd. 1978), *rev. denied* , FCC 79-451, July 19, 1979; *Enterprise Broadcasting, Inc.* , 56 FCC 2d 352, 357, 35 RR 2d 652, 659 (Rev. Bd. 1975). Thus, the ALJ's award of a slight preference is affirmed.

13. *Specialized Programming Issue* . Big Bend excepts to the ALJ's *Order* , FCC 82M-3687, released November 22, 1982, wherein he declined to add a specialized programming issue based on alleged substantial and material differences between the applicants' program proposals. Specifically, Big Bend argues that it is offering substantial amounts of Spanish-language programming whereas Rio Grande proposes general programming. It submits that Brewster County, in which Alpine is located, has a 47.8% Hispanic population, that there is a need for additional Spanish-language programming in the community, and that it will devote 17.7% of its weekly programming to Spanish classical music and will carry news, public affairs, and other programs in the Spanish language so that one-

third of its format will be Hispanic-oriented. The ALJ, to whom these same assertions were presented, denied the issue because Big Bend's showing failed to meet the threshold standards enunciated in *George E. Cameron, Jr. Communications* , 71 FCC 2d 460, 45 RR 2d 689 (1979). We agree.

14. The Commission held in *Cameron* that a specialized programming issue would not be added except upon a showing that the proposed format was not available in the market in a substantial amount. *Id.* at 464–5, 45 RR 2d at 693–4; *see also Flint Family Radio, Inc., supra,* 69 FCC 2d at 42–3, 41 RR 2d at 1161. Here, the ALJ found, and Big Bend does not challenge these findings, that its Station KVLF currently broadcasts Spanish-language programming from 8:00 to 10:00 p.m., Monday through Friday, and from 7:45 to 8:00 p.m. on Thursdays, including, *inter alia,* news, music, and public service announcements. We agree with the ALJ that the 10 ¼ hours of Spanish-language programming broadcast by KVLF in a one-station market precludes a finding that a reasonable amount of such programming is not already present in the market. *Compare Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 50 RR 2d 1251 (Rev. Bd. 1982) (21 hours held reasonable amount in six-station market), *with United Broadcasting Company, Inc.*, FCC 83R-55, released August 24, 1983 (5 nighttime hours held inadequate in 17-station market). Accordingly, the ALJ properly declined to add the requested issue.[9]

15. *Final Comparative Evaluation.* All decisionally significant exceptions have been considered. Rio Grande has been awarded a solid preference for diversification, and Big Bend has received a moderate preference for integration, a substantial preference for past broadcast record, and a slight preference for auxiliary power. Under the Commission's *Policy Statement, supra,* there are two primary objectives in the comparative analysis, best practicable service to the public and diversification of control. Rio Grande's solid preference for diversification, which is one of these twin pillars, must outweigh any comparable or lesser preference under any particular element of best practicable service earned by Big Bend. *See The O.T.R.H., Inc., The Old Time Religion Hour, Inc.*, 54 RR 2d 989 (Rev. Bd. 1983); *Colorado West Broadcasting, Inc., supra,* 57 FCC 2d at 533, 35 RR 2d at 1642. Thus, Rio Grande's diversification preference easily surpasses Big Bend's preferences for integration and auxiliary power. While Big Bend also earns a substantial preference for KVLF's past broadcast record, we conclude that this alone, or in combination with its other lesser preferences, is not sufficient to raise its overall advantage under best practicable service to the point where it outweighs Rio Grande's diversification preference. Al-

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[9] We note, but need not reach, the ALJ's alternative basis for denial of the issue, namely, that Big Bend is not proposing substantial amounts of Spanish-language programming and therefore its proposal cannot reasonably be considered a specialized programming format.

though the choice is a close one, the fact that Rio Grande will bring a new broadcast voice and first competitive broadcast service to Alpine must be viewed under the preponderance of Commission precedent as the most significant feature of this case. *See Communications Properties, Inc., supra* (applicant with substantial diversification preference chosen over applicant with lesser preferences for integration, comparative coverage, past broadcast record, and auxiliary power and would have prevailed *even if* losing applicant had received substantial preferences for integration and past broadcast record); *Brownfield Broadcasting Corp., supra.* A grant of Rio Grande's application will best serve the public interest, convenience and necessity.

16. ACCORDINGLY, IT IS ORDERED, That the application of Rio Grande Broadcasting Company (File No. BPH-811130AV) for a construction permit for a new FM station at Alpine, Texas, IS GRANTED, and the application of Big Bend Broadcasters (File No. BPH-810622AR) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 83D-37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BIG BEND BROADCASTERS Alpine, Texas	BC Docket No. 82-559 File No. BPH-810622AR
RIO GRANDE BROADCASTING COMPANY Alpine, Texas	BC Docket No. 82-560 File No. BPH-811130AV
For Construction Permit for New FM Station	

Appearances

Marvin J. Diamond and *Susan Wing* on behalf of Big Bend Broadcasters; *Thomas Hendrickson* on behalf of Rio Grande Broadcasting Company; and *Arthur I. Steinberg* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

(Issued: June 27, 1983 Released: July 8, 1983)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Big Bend Broadcasters (Big Bend) and Rio Grande Broadcasting Company (Rio Grande) for an FM radio station to operate on Channel 224A in Alpine, Texas. By *Hearing Designation Order*, 47 Fed. Reg. 36284, published August 19, 1982, the applications were set for hearing on the following issues:

> To determine whether Big Bend Broadcasters failed to disclose the nature and extent of other broadcast holdings of an immediate member of a principal's family and, if so, the effect thereof on the applicant's basic and/or comparative qualifications.
>
> To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

The *Hearing Designation Order* provided for consideration under the standard comparative issue of the areas and populations proposed to be served by the applicants. That aspect of the comparative issue, however, was deleted by the Presiding Judge upon Big Bend's showing of no significant difference in the coverage areas of the applicants. *Order*, FCC 82M-3405 (October 29, 1982). By *Order* of November 23, 1982 (FCC 82M-3726), the Presiding Judge granted Big Bend's Motion for Leave to Adduce Past Broadcast Record Evidence of its AM station KVLF, in Alpine, Texas.

2. A prehearing conference was held on October 21, 1982. Hearings were held on January 5th and 6th, 1983. The record was closed by *Order* of the Presiding Judge released January 21, 1983, FCC 83M-308.[1] Proposed Findings of Fact and Conclusions of Law were filed by the applicants on March 10, 1983. Reply findings were filed by both applicants on March 24, 1983.

Findings of Fact

Rio Grande Broadcasting Company

The Applicant

3. Rio Grande Broadcasting Company is a stock corporation organized under the laws of the State of Texas in 1981. It has two shareholders identified as follows:

William Thomas Beard, III, 150 Shares, 50% ownership, Vice President, Secretary/Treasurer, Director

William Laird Brooks, 150 Shares, 50% ownership, President, Assistant Secretary/Treasurer, Director

(RG Ex. 1)

As of the close of the "B cut-off period" there were three stockholders each owning one-third of the Company's stock. Mr. Brooks' and Mr. Beard's current 50% share resulted from their purchase of the interest of the third shareholder. Accordingly, their interest at the close of the "B cut-off period" was 33 ⅓% (Tr. 181).

Integration

4. William L. Brooks will have overall responsibility for day-to-day management of the radio station. He will serve as general manager, devoting a minimum of twenty hours per week to the station (RG Ex. 5).

5. *William Laird Brooks*. Mr. Brooks was born on January 1, 1945 in Norfolk, Virginia. He attended primary school and high school in El Paso, Texas. From 1965 to 1974 Mr. Brooks served in the

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[1] The record was reopened on April 19, 1983 to accept an amendment to the Big Bend application and again closed the same day (See *Order* FCC 83M-1308).

United States Army where he was a Special Agent for Army Counter Intelligence. This service included nineteen months in Vietnam. He was awarded a number of medals fof outstanding service in the U.S. Army. From 1974 through 1976 Mr. Brooks worked for a printing and direct mail company in El Paso, Texas (GLS, Inc.) (RG Ex. 4).

6. In 1977 Mr. Brooks moved to Alpine, Texas and started the Territorial Printer, Inc. which is involved in commercial printing. In November 1977 he, along with two other parties, purchased *The Alpine Avalanche*, a weekly newspaper. Mr. Brooks has lived and worked within the city of Alpine since 1977 (RG Ex. 4).

7. Since moving to Alpine in 1977, Mr. Brooks has served as president of the Alpine Chamber of Commerce (1980). He remains an active member of the Chamber of Commerce with no official position. He is a former director of Brewster County Industries, a sheltered workshop for the handicapped which he helped by developing advertising programs to run in *The Alpine Avalanche* (Tr. 194). He has coached pony league baseball and is the sponsor of two teams each year. He is a financial supporter and participant in various local projects including the Big Bend Chamber Orchestra and Sul Ross Summer Theater. He serves on the Board of Directors of the Brewster County Industrial Development Corporation (RG Ex. 4, pgs. 1 and 2).

8. Mr. Brooks has experience working in radio broadcast stations as follows: (RG Ex. 4, pgs. 2 and 3)

> From January 1964 to August 1964 he worked with KELP radio and television in El Paso, Texas. There he served as an announcer, newsman and general station employee on a full-time basis.
>
> From January 1965 to May 1965 he worked at KINT radio, El Paso, Texas where he served as a full-time announcer and news director.
>
> From May 1965 to August 1965 he worked as a full-time announcer on radio station KDAV, Lubbock, Texas.
>
> In September and October of 1967 he served as a full-time announcer on KHEY radio, El Paso, Texas.
>
> In addition, Mr. Brooks worked on his college radio station, KVOF, Texas Western College in El Paso, Texas. This work included service as program director in the academic year of 1963 to 1964. This was a part-time position constituting approximately 10 to 15 hours per week.
>
> On approximately three occasions Mr. Brooks has recorded advertising spot announcements for use on KVLF, Alpine, Texas at the request of advertisers (Tr. 197).

9. *William T. Beard, III*. Mr. Beard was born on January 20, 1945 in San Antonio, Texas. He resides on Leoncita Ranch Headquarters. This residence is located outside of the one millivolt per meter contour of the broadcast station. However, the land on which it sits includes areas both within and without that contour (RG Ex. 3, Tr. 183). Mr. Beard maintains a law office in Alpine. He divides his

time approximately equally between the law practice in Alpine and management of the Leoncita Ranch (RG Ex. 3, Tr. 267). Mr. Beard does not propose to be integrated into the day-to-day management of the radio station (RG Ex. 3).

Diversification

10. Rio Grande has no other media interests. However, both its principals have ownership interests in Far West Texas Publications, Inc. (Far West Texas), which publishes *The Alpine Avalanche*. *The Avalanche* is a weekly newspaper serving Alpine. Brooks owns 51⅔% of Far West Texas, and Beard owns 7½ % (RG Ex. 2). Brooks is a director and president of Far West Texas, and is publisher of *The Avalanche* (Tr. 205). Beard performs the corporation's legal work, but holds no office and does not participate in the management of the company or of the newspaper (Tr. 253, 258). He has never noted his stock and exercises no influence over the operation of the business (RG Ex. 2; Tr. 258).

11. Brooks has responsibility for the editorial content of the newspaper, and controls the operation on a day-to-day basis (Tr. 210–212). He has the legal authority to include in the newspaper points of view that he would like expressed (Tr. 212–213).

Big Bend Broadcasters

The Applicant

12. Big Bend is a Texas corporation whose officers, directors and shareholders are as follows:

Gene Hendryx Alpine, Texas	President, Director 55% Shareholder
Gene Ray Hendryx, Jr. Alpine, Texas	Director
Barney Hubbs Pecos, Texas	Secretary-Treasurer, Director, 15% Shareholder
Bill Hubbs Pecos, Texas	Director 10% Shareholder
Jack Hawkins Cortez, Colorado	Vice President, Director 10% Shareholder
James W. Hawkins Fort Stockton, Texas	Director 10% Shareholder

In an amendment to Big Bend's application on the B cut-off date governing this proceeding, Barney Hubbs and James W. Hawkins committed to sell their interests to other present stockholders if Big Bend is awarded the FM permit. The other present stockholders, except Gene Hendryx, committed to purchase the stock. *E.g.*, Big Bend Ex. 7(c). Thus, if Big Bend's application is granted, the stock will be owned as follows:

Gene Hendryx	55%	Shareholder
Gene Ray Hendryx, Jr.	12%	Shareholder
Jack Hawkins	15%	Shareholder
Bill Hubbs	18%	Shareholder

(Big Bend Ex. 1).

No price has been set for this sale nor has the manner of payment been agreed upon (Tr. 89, 90). Mr. Gene Hendryx has stated that "we have a more or less understanding among the families how it would be paid for but there is no agreement on it. No, because we haven't set a price on the stock" (Tr. 89–90).

Integration

13. Gene Hendryx will serve as president and general manager, devoting a minimum of 30 hours per week. Gene Hendryx, Jr. will serve as operations manager devoting a minimum of 30 hours per week. Bill Hubbs will serve as sales manager devoting a minimum of 20 hours per week.

14. Gene Hendryx has lived in Alpine since 1945 (Big Bend Ex. 4; Tr. 28). Big Bend Exhibit 4 lists the government and community positions he has held during the past 35 years. He has held several elective and appointed government offices, including representing the 66th legislative district in the Texas State Legislature from 1962–68; he has served with multiple Alpine service and civic organizations; he has been active with military and veterans organizations; he has undertaken local education and youth service activities; and he has been a leader in conservation and tourist-development organizations in the West Texas area. A partial list of organizations in which he has been involved in the past five years follows:

Appointed by Mayor and City Council of Alpine to Alpine Tourist Development Board (1980-present).

Chairman of the Blood Bank 1982–83 and for several previous years.

Big Bend Memorial Hospital fund-raising for new hospital equipment (1981); formerly on Board of Directors and Secretary of Board.

Commander of American Legion Post 79 (1982–83); other offices through the years.

Active member of Elpidio Ramos VFW Post; other offices through the years.

In 1979, helped organize Disabled American Veterans Post in Alpine; member.

In 1980, appointed to three-member County Veterans Land Board (supervises administration of loan funds to qualified veterans).

> Member Sul Ross University Century Club (fund raising arm of University athletic department).
>
> Appointed by Texas Governors to Board of Directors of Texas Conservation Foundation (1970-present); presently Vice-Chairman of Board.
>
> At present, and through the years, has handled publicity activities for several local organizations, including: American Red Cross Committee, March of Dimes, Brewster County Chapter of American Cancer Society, Alpine Cemetary Association, Alpine Chamber of Commerce, Big Bend Livestock Show.

(Big Bend Ex. 4; Tr. 101–102, 141–142). Gene Hendryx has received commendations from local and area communities, Chambers of Commerce and service organizations for his community leadership through the years. These communities and organizations have held Appreciation Days and Appreciation Dinners in his honor. In 1976, The Alpine City Counsel named what Gene Hendryx called "the prettiest street in Alpine" after him—"Hendryx Avenue"—and held a banquet in his honor to recognize his community contributions (Big Bend Ex. 4). Likewise, the Board of Regents of the Texas State University System and Sul Ross State University have honored Gene Hendryx for his civic efforts and achievements. *Id.*

15. With the exception of five months in early 1950, Gene Hendryx has worked continuously at KVLF-AM in Alpine since 1947. He has owned a controlling interest in and been president of the station since the mid-1950s. He was general manager of the station until 1976 when he turned over the station's day-to-day operation to his son, Gene Ray Hendryx, Jr. (Ray Hendryx). He continues to be active in the station's operation as president of the licensee. Gene Hendryx has recently served for three years on the Board of Directors of the Texas Association of Broadcasters, and has served as Secretary, Vice President and President of the Association (Big Bend Ex. 4, pgs. 6–7; Tr. 102).

16. Ray Hendryx is a life-long resident of Alpine. He worked at KVLF from 1967 to 1972 on a part-time basis while in high school and full time during the summer months. Following four years' service in the Navy (including communications duty and experience), he returned to Alpine and resumed full-time employment with KVLF in May 1976. Shortly thereafter, he was named general manager of the station, a position he has held since that time (Big Bend Ex. 5).

17. The Alpine area civic organizations in which Ray Hendryx is and has been active are:

> Alpine Kiwanis Club, Member, 1976–77
>
> March of Dimes, Brewster County Chapter,
> Member Board of Directors, 1977–79
>
> Alpine Chamber of Commerce
> Member Board of Directors, 1978–80
> Chairman of Sul Ross University Committee, 1979–80

American Legion, Big Bend Post 79, Member, 1978-present
Chairman of American Legion Executive Committee, 1980
Financial Officer American Legion, 1980–81
Publicity Officer, 1981-present

Brewster County Industries, Inc., sheltered workshop
for the handicapped, Charter Member, 1979–81

Alpine Buck Boosters, Member, 1979-present.
This organization raises funds for the public
high school's athletic program.

Brewster County Appraisal District
Member, Board of Directors, 1980–81
Board Secretary, 1980
Board Chairman, 1981

Big Bend Civic Center Building Committee, Inc.
Charter Member, Board of Directors, 1980-present

Member, Century Club (fund-raising organization for
Sul Ross University athletic program).

(Big Bend Ex. 5).

18. Bill Hubbs, a resident of Pecos, Texas, has held various radio positions since 1948. From 1948–1951, he worked part-time during school months and full time in the summers at Station KIUN(AM) in Pecos, Texas in announcing and sales jobs. For several months in 1952 to 1953, he was employed full time as announcer and salesman for KVLF in Alpine, Following a four-year tour of duty with the Navy, in 1957 he returned to Pecos where he became controlling owner and general manager of KIUN, positions he held until 1978. Since 1959, Bill Hubbs has been 10% owner and a director of KVLF. From 1959 to 1977, he owned an interest in KFST, Inc., then licensee of Stations KFST-AM and KPJH-FM in Fort Stockton, Texas (Big Bend Ex. 6).

Diversification

19. Big Bend is licensee of Station KVLF-AM in Alpine. The company has no other media interests (Big Bend Ex. 2). Of the four persons who will remain as principals of Big Bend if its application is granted, none have any other media interests. Although until early 1983 Jack Hawkins had an interest in Stations KFST-AM and KPJH-FM in Fort Stockton, Texas, he had pledged on the B cut-off date governing the proceeding to divest those interests and has now done so (Big Bend Ex. 2; March 10, 1983 amendment to Big Bend application accepted by *Order* of the Presiding Judge released April 19, 1983).

Alpine Area Media

20. The 1980 U.S. Census reported Alpine's population to be 5,465.[2] Brewster County's 1980 population was 7,573 (Joint Ex., para. 5). Alpine is in an isolated, mountainous area of West Texas. *E.g.*, Big Bend Ex. 10, page 2; Big Bend Ex. 19, page 1; Tr. 171. The city of Alpine, located in Brewster County, has one radio station, KVLF-AM which is licensed to Big Bend Broadcasters. There is no other radio station licensed to any community in Brewster County (Big Bend Ex. 8). According to Gene Hendryx, it is perhaps possible for Alpine residents to receive the Fort Stockton station located approximately 66 miles away during the daytime (Tr. 105). It is also possible to get three other stations during the daytime depending on weather conditions and circumstances. At night it is possible to pick up some nationwide clear channel stations (Tr. 142). The stations outside Alpine do not serve Alpine's needs with their programming (Tr. 142–144).

21. The *Odessa American* has a daily circulation in Brewster County of 270 (.7% of its total daily circulation of 36,771) and a Sunday circulation of 445 (1% of its total Sunday circulation of 44,330). Odessa is 128 miles from Alpine. The *San Angelo Standard Times* has a daily circulation in Brewster County of 483 (1.1% of its total daily circulation of 42,875) and a Sunday circulation of 522 (1.2% of its total Sunday circulation of 41,737).[3] San Angelo is 206 miles from Alpine (Joint Ex. paras. 1,4). These two papers seldom carry articles covering the Alpine area (Tr. 114, 145–146). The students of Sul Ross State University irregularly publish a college newspaper, the *Skyline*, with a circulation of 2,000 copies (Tr. 108). The student population of Sul Ross is 1840 (Joint Ex. para. 3). The newspaper generally carries only campus news (Tr. 144–145). According to Mr. Brooks, the Sul Ross *Skyline*, as a college newspaper, does not compete with *The Avalanche* for readers (Tr. 233–234). The *Lajitas Sun* is a promotional "throw-away" circulated in Alpine to promote real estate sales in a private resort area 130 miles south of Alpine (Tr. 110–112).

22. *The Alpine Avalanche* is a weekly newspaper with a 1982 circulation of 4850 copies. Of these copies, 2196 are sold through dealers, carriers, street venders and counter sales. 2561 are mail subscribers throughout the United States (Big Bend Ex. 8, Attachment B). *The Alpine Avalanche* contains virtually no national or regional news and no "breaking news". It is limited to advertisements and local news stories (Tr. 119). *The Avalanche* has an

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[2] Official notice taken.

[3] Neither the proposed FM stations nor the existing AM station encompass all of Brewster County (Joint Ex. para. 1). The circulation figures presented above, therefore, overstate the newspapers' circulations in the existing and proposed service areas.

independent editor who also has an ownership interest in the newspaper (Tr. 237).

23. A cable television system serves Alpine with 11 channels offering a variety of distant signals: three national network-affiliated stations, an Atlanta, Georgia independent station, the Christian Network, Nickelodeon and C-Span (Tr. 105). The system had a local channel, but that channel now carries the C-Span programming. During evening hours, that channel visually programs the Associated Press wire news, and carries no local news of Alpine or Brewster County (Tr. 143–144).

24. Radio Station KVLF is an affiliate of the Mutual Broadcasting System. Big Bend Broadcasters has stated that if it is awarded the FM license, that station would also be affiliated with the Mutual Broadcasting System. Mutual offers three different networks or formats. The FM station chose one not now offered on KVLF (Tr. 122, 146). Rio Grande Broadcasting would affiliate with a network but not the Mutual Broadcasting Network (Tr. 233).

25. If Big Bend receives the construction permit, its AM and the FM stations will have the same management and their studios would be at the same location (Tr. 96). While no decision had been made as to whether there would be a separate news staff, Mr. Hendryx acknowledged that it would be foolish to utilize separate reporters to cover the same stories, such as council meetings. However, the FM news programming will be different from that now offered on Big Bend's AM station (Tr. 122–123; 146–147). Big Bend's application states that "the AM outlet also has extensive coverage of news from the networks, wire services, and their own local staff. There is no need to duplicate that coverage, although we propose to devote over 9% of FM airtime to news" (Tr. 98). According to Mr. Gene Hendryx, Sr., advertising would be sold by separate AM and FM staffs and that there would be no mixing of the two (Tr. 92).

26. Rio Grande's radio station studio and offices will be in physically separate locations from those of the newspaper (Tr. 227–228).

Auxiliary Power

27. Big Bend will provide dual auxiliary power sources at the FM transmitter site and at the FM studios (Big Bend Ex. 10). By virtue of this arrangement, in the event of either a commercial power failure, or a studio equipment failure unrelated to commercial power, the station will be able to return to the air "instantly". *E.g.*, Tr. 160–161. The availability of a stand-by power source is considered important because Alpine suffers severe weather conditions—ice and heavy snows in winter, and electrical storms in summer—that often cause commercial power failures. From January 1 to December 20, 1982, West Texas Utilities suffered seven major power failures (Big Bend Ex. 10). Because of the effectiveness and reliability of Big Bend's

existing emergency facilities, which are identical to the facilities proposed for the FM station, the Texas Department of Highways and Public Transportation has erected signs along seven major highways in Brewster, Jeff Davis and Presidio counties advising motorists to tune to KVLF for weather information during emergencies involving potentially dangerous weather and road conditions (Big Bend Ex. 10; Ex. 16, page 7).

KVLF Past Broadcast Record

28. Radio Station KVLF began operation on February 1, 1947. Gene Hendryx has worked at the station since its inception, and has been controlling owner and president of the licensee since the mid 1950's. Ray Hendryx has been general manager of the station since 1976 (Big Bend Ex. 4).

29. A comparison of KVLF's 1980 composite week performance with the 1980 composite week performance of 16 other similarly-sized stations within a 260-mile radius of Alpine follows:[4]

1980 COMPOSITE WEEK PERFORMANCE[5]

Station & Market	*News* (%)	*Public affairs* (%)	*All other* (%)	*Total non-entertainment* (%)
KFST (Ft. Stockton, TX)	15.4	2.75	11.2	27.2
KVKM (Monahans, TX)	19.3	5.4	4.0	28.8
KERB (Kermit, TX)	18	5	7	30
KXOI (Formerly KBSN) (Crane, TX)	6.3	3.3	44	53.6
KWGH[6] (Big Lake, TX)	---	---	---	---
KIKZ (Seminole, TX)	12	3.6	12.4	28
KVRN (Sonora, TX)	17	2.04	5.74	24.8
KLEA (Lovington, NM)	12	3	4	19
KVMC (Colorado City, TX)	23	3	13	39
KMBL (Junction, TX)	19	4.5	6.3	29.8
KRRR (Ruidoso, NM)	12.98	3.77	2.07	18.32
KPOS (Post, TX)	10.6	8.6	4.4	23.6
KRUN (Ballinger, TX)	17.5	1.7	8.2	27.4
KRAN (Morton, TX)	11.3	3.2	7.3	21.8

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[4] The study stations were selected by identifying, from a list of all stations within 300 miles of Alpine, the 15 domestic stations licensed to markets closest to Alpine with populations under 10,000. A 16th station was added because one of the 15 stations (KWGH, Big Lake, TX) did not provide composite week figures in its 1980 renewal application, due to a recent assignment of license (Big Bend Exs. 11, 12, and 13).

[5] Source: 1980 license renewal applications filed with the FCC (Question 14). Relevant portions of renewal applications are included in Big Bend Ex. 12.

[6] Station KWGH, Big Lake, TX, supplied no composite week figures in its 1980 renewal.

Station & Market	*News* (%)	*Public affairs* (%)	*All other* (%)	*Total non-entertainment* (%)
KZZN (Littlefield, TX)	14.1	3.0	5.3	22.4
KMIO (Formerly KBGG) (Merkel, TX)	8	2	6	16
AVERAGE	14.4	3.7	9.4	27.3
KVLF - 1980 renewal	18 25% above average	7 89% above average	13 38% above average	38 39% above average

Review of the above materials shows that in every category, KVLF performed above the average of the similarly situated study group stations (Big Bend Ex. 12).

30. KVLF also outperformed most of the stations on an individual comparison basis. In the news category, KVLF ranked 4th of 16 (top 25th percentile); in the public affairs category, the station ranked 2nd of 16 (top 12th percentile); in the "all other" category, the station ranked 2nd of 16 (top 12th percentile); in total non-entertainment, the station ranked 3rd of 16 (top 18th percentile).

31. A comparison of KVLF's 1977 composite week performance with the composite week performance of the 16 study group stations yielded results quite similar to the study involving the 1980 composite week.

32. Big Bend also presented evidence regarding the quality of its programming, and the ways in which its programming meets the ascertained needs of the Alpine area. Materials from KVLF's 1977 and 1980 renewal applications show that the station regularly presented significant amounts of public affairs, religious, agricultural and other informational programming. An average of four to five hours per week of the station's religious programming was presented on a paid basis (Tr. 134).

33. Big Bend also presents Spanish-origin programming.[7] Programs presently aired in Spanish are:

8:00–10:00 p.m., Monday-Friday. Music, news, public affairs and commercial material.

7:45–8:00 p.m., Thursday. Spanish religious programming.

Big Bend Ex. 21. Additionally, because the station employs bi-lingual announcers, fast-breaking news and announcements of local emergency situations are made in both Spanish and English.

34. To keep apprised of the on-going needs of its entire community, KVLF maintains "a constant dialogue between station personnel and community leaders". According to Gene Hendryx, "this continu-

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[7] The 1980 U.S. Census showed the Spanish-surnamed population in Alpine to be 2,568, 47% of the population. Official notice taken.

ing dialogue permits us to anticipate community needs, and to program for these needs through both regular and special program efforts" (Big Bend Ex. 18). Although the station attempts to anticipate community needs and plan in advance for them, sometimes emergency or other special situations arise requiring specially designed responsive programming. According to Gene Hendryx, "Our one-on-one knowledge of the community and its leaders permits us to act immediately and responsively without going through a lot of red tape". Big Bend presented some 10 examples of such responsive programs (Big Bend Ex. 20).

35. In its 36 years of operation, KVLF has been cited only once for violation of the Commission's technical rules (Tr. 128). In 1975, the Chief of the Broadcast Bureau issued an Order of Forfeiture to KVLF for "failing to use the indirect method for computation of operating power" for several days in 1974 when heavy rains and flooding in Alpine saturated the area and effected the transmitting antenna ground resistance (RG Exs. 10 and 11). The forfeiture was for $250. In requesting that the forfeiture not be imposed, KVLF submitted statements from the Brewster County Judge, the Mayor of Alpine, the United States Weather Bureau and the Texas Highway Department to explain the extenuating flooding circumstances (Tr. 148). Although the Broadcast Bureau recited its consideration of the licensee's "extensive showing of the outstanding public service which it performed during the heavy rains and flooding," it nonetheless imposed the $250 fine (RG Ex. 10, page 2).

36. KVLF has received awards, citations, and letters of thanks from its community and its audience. The station has received citations from civic groups in the area, including the Lions Club, Pilot Club, American Legion, VFW, area churches, area Chambers of Commerce, agricultural groups, the Soil Conservation Service, and various state and federal agencies.[8] One of the most recent of these was a "Certificate of Appreciation" received in January 1982 from the Alpine Chamber of Commerce "for 35 years of Service to the Community" (Big Bend Ex. 22).

Reporting by Big Bend of Broadcast Interests

37. Question 19, Section II of the former Form 301 required identification of any immediate family member with broadcast interests (Big Bend Ex. 7(e)). Although Big Bend's application disclosed the father-son relationships of its six principals, it did not disclose the broadcast interests of Steve W. Hawkins (son of James W. Hawkins and grandson of Jack Hawkins) and his wife (Big Bend Ex. 7(a), page 6). Immediately after publication of the Designation

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[8] Big Bend offered Exhibit 24 for identification, a package of 68 awards, citations and proclamations received by the station for its years of community service. The exhibit was rejected as being untimely exchanged and cumulative (Tr. 74–75).

Order, Big Bend amended its application to report Mr. and Mrs. Steve Hawkins' interests (Big Bend Ex. 7(f)).[9]

38. According to Gene Hendryx, the failure to report the broadcast interests was inadvertent. Mr. Hendryx was unaware, until mid-August when he read the Designation Order, that the Commission required information regarding family members' broadcast interests. *Id.*, paragraph 4. Mr. Hendryx was solely responsible for completing Big Bend's FM application, and did so without assistance of counsel. When he filled out the application, he "fully listed everything [he] understood was required" *Id.*, paragraph 5. Mr. Hendryx tried in good faith to provide the FCC with complete information. When he first hired communications counsel in December 1981, Big Bend immediately amended the application to clarify possible inconsistencies pointed out by the attorneys. *Id.*, paragraph 6; *see also* Big Bend Ex. 7(b). It never occurred to Mr. Hendryx that the broadcast interests held by the relatives of Big Bend's owners might be material in any way to Big Bend's FM application.

39. Steve Hawkins' broadcast interests are shown in the Ownership Reports on file for Stations KHLB, KMRB-FM and KULM-FM (Big Bend Exs. 7(h) and 7(i); Mr. James W. Hawkins' interest in those stations is fully disclosed in Big Bend's application (Big Bend Ex. 7(a)). Mr. Steve Hawkins is an adult, married and lives in Marble Falls, Texas, away from his father's home. James Hawkins who lives in San Angelo, Texas, has pledged to divest his interest in the applicant if Big Bend's application is granted following comparative hearing (Big Bend Exs. 7(c) and 7(d)).

Ultimate Findings and Conclusions

40. This proceeding involves the mutually exclusive applications of Big Bend Broadcasters (Big Bend) and Rio Grande Broadcasting Company (Rio Grande) for a construction permit to build a new FM station in Alpine, Texas. With the exception of a reporting issue specified against Big Bend, both applicants were found basically qualified. While Rio Grande does not argue that Big Bend should be disqualified under the reporting issue, that issue will nevertheless be considered first because only basically qualified applicants are entitled to comparative consideration. *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub nom, Guinan v. Federal Communications Commission*, 297 F. 2d 782 (1961).

Reporting Issue

41. Big Bend's application failed to disclose the broadcast interests of Steve W. Hawkins (son of James W. Hawkins and

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[9] The unopposed amendment was accepted by *Order* of the Presiding Judge released October 4, 1982 (FCC 82M-3063).

grandson of Jack Hawkins) and his wife. This information was required pursuant to Question 19, Section II of Form 301.[10] Big Bend attributes the failure to supply the information to a misunderstanding on the part of Gene Hendryx who prepared Big Bend's application without assistance of counsel. It simply never occurred to Hendryx that the broadcast interest held by relatives of Big Bend's owners might be material to Big Bend's application. Hendryx's misunderstanding was caused by the fact that the Commission's ownership report, with which Hendryx was familiar, only requires the reporting of media interests of a licensee's principals. Immediately after release of the Designation Order, Big Bend amended its application to report Mr. and Mrs. Steve Hawkins' broadcast interests, which interests were of course disclosed in Commission ownership reports.

42. The failure to list the broadcast interests appears to have been an inadvertent omission caused by Mr. Hendryx's good-faith, but erroneous belief that the information was not required. Such information was on file in Commission ownership reports and there appears to have been no deliberate attempt to conceal this information which, in any event, was of dubious decisional significance. Under these circumstances, this isolated reporting failure clearly does not impact on Big Bend's basic qualifications, nor does it constitute a proper basis for the imposition of a comparative demerit.[11] *HLD & M Communications*, FCC 83R-18, released March 17, 1983; *Webster Baker Broadcasting*, 88 FCC 2d 944 (1982).

Comparative Issue

43. Both applicants have been found basically qualified and it is now necessary to determine which of the mutually exclusive applications would, on a comparative basis, better serve the public interest. The comparative evaluation is governed by the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (hereafter, the *Policy Statement*). In the *Policy Statement*, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

44. In the landmark case of *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court set as a First Amendment objective the maximum possible diffusion of communications facili-

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[10] This requirement is now Item 8(b) of the revised Form 301 (January 1982).

[11] Rio Grande argues that this matter should be considered in connection with Big Bend's claim of an unusually good past broadcast record.

ties. In its *1965 Policy Statement*, the Commission describes diversification of control of the media of mass communications as, "a factor of primary significance". *Id.* at 394. In evaluating the significance of media interests under diversification, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. *Policy Statement* at 395. Other important factors to weigh are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas. The *Policy Statement* also indicated that control of large interests elsewhere in the state or region may outweigh control of a small medium of expression (such as a weekly newspaper) in the same community. The media interests of Big Bend and Rio Grande must be evaluated with the above principles in mind.

45. Big Bend is the sole owner and licensee of KVLF-AM, a full-time station in Alpine. Neither Big Bend nor its principals who will remain as owners if its application is granted, have any other media interests.[12] Rio Grande has no other media interests, but its two owners have a combined 591;6% ownership interest in Far West Texas Publications, Inc. which publishes the *Alpine Avalanche*, a weekly newspaper serving Alpine. Brooks, who owns 50% of Rio Grande[13] and is proposed general manager of the FM station, owns 51⅔% of Far West Texas, is its president, and a director. In addition to his legal control of the company, Brooks as publisher of the newspaper, controls its operation on a day-to-day basis, and has the authority to include in the paper points of view he would like expressed. Beard, 50% owner of Rio Grande, owns 7½% of Far West Texas' stock and performs the company's legal work.

46. Big Bend tries to equate the *Avalanche* with KVLF by comparing the readership of the *Avalanche* and Arbitron data for KVLF. Specifically, Big Bend argues that KVLF's combined weekly audience is 7,000. This statistic was interpreted by Arbitron to mean that 7,000 different persons listen to KVLF for a minimum of five minutes during the week in which the survey was conducted (Big

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[12] Jack Hawkins had an interest in KFST, Inc., but pledged to divest that interest on the B cut-off date governing the proceeding, and has now done so. A timely and unequivocal promise to divest a broadcast interest is effective to avoid comparative demerit by virtue of that interest. *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813–814 (Rev. Bd. 1982); *Las Misiones De Bejar Television Co.*, FCC 83R-10 (released February 11, 1983) (note 1).

[13] Although for integration purposes, Brooks is deemed to own only 33⅓% of Rio Grande's stock, for diversity purposes his actual 50% ownership is cognizable. Although an applicant may not enhance its comparative position with a late-filed amendment, *e.g.*, *Azalea Corp.*, 38 FCC 2d 195 (1972), such an amendment can diminish the applicant's position.

Bend Ex. 9). In contrast, Big Bend argues that the minimum weekly readership of the *Avalanche* is 8,069.[14] This figure was arrived at by using a multiplier to the total *Avalanche* distribution. There is no record evidence to support the claim that the *Avalanche* has a weekly minimum readership of 8,069. The total population of Alpine is 5,465 and all of Brewster County's population is 7,873. Some of the population is Spanish speaking and children who cannot read the *Avalanche*. Under these circumstances, the argument that the *Avalanche* is read by 8,069 is an unsupported exaggeration.

47. Big Bend's attempt to equate the *Alpine Avalanche* to KVLF in significance as a media outlet and its argument that Rio Grande's principals' 591;6% interest in the *Avalanche* cannot be distinguished from Big Bend's 100% interest in KVLF are rejected. First, the *Avalanche*, while controlled by the principals of Rio Grande, is only 591;6% owned by such principals whereas Big Bend is 100% owner of the license of KVLF. More important however, the *Avalanche* is a weekly newspaper whereas KVLF-AM is the only full-time station in Alpine. While there is another weekly newspaper in Alpine, the *Sul Ross Skyline* published by the students of Sul Ross State University, there are no other broadcast stations or allocations for Alpine. Thus, a grant of Big Bend's application would create a radio media monopoly in Alpine. Clearly, the media significance of a full-time radio station is far greater than that of a weekly newspaper and Big Bend's attempt to equate the two is rejected as lacking in factual or legal support.

48. The Review Board has held that where an applicant is 100% owner of the only other broadcast station in a community, that ownership can result in a preference for the second applicant which is "well-nigh overwhelming". *KBBS, Inc.*, 91 FCC 2d 115 (1982). Because the Rio Grande principals own 591;6% of a weekly newspaper in Alpine, it may not be proper to here characterize the diversification preference to be awarded Rio Grande as "well-nigh overwhelming". Nevertheless, because Big Bend is already the licensee of the only broadcast station in Alpine, the diversification preference in favor of Rio Grande must still be considered substantial.[15] *Brownfield Broadcasting Corp.*, FCC 83R-31; Review Board, released April 28, 1983.

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[14] The *Avalanche's* weekly circulation is 4,803. Only 2,196 copies of the *Avalanche* are sold locally with the remaining 2,561 copies mailed to subscribers throughout the United States.

[15] Were it not for Rio Grande's principals' ownership of 591;6% of the *Avalanche*, one of two weekly newspapers in Alpine, this would not even be a close case. While that factor makes the case a lot closer, it does not, in any significant way, detract from the conclusion that Rio Grande is entitled to a substantial diversification preference. The significance of a weekly newspaper as a media outlet simply cannot be equated with a full-time radio station. And, because the radio station is 100% owned by Big Bend and is the only station in the

Integration

49. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated". *Policy Statement, supra* at 395. Full-time, or almost full-time participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience, and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for an applicant to receive integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

50. Big Bend proposes that three of its owners will have management roles in the operation of the FM station: Gene Hendryx, 55% owner, will work a minimum 30 hours a week as president and general manager. Gene Ray Hendryx, Jr., who will be a 12% owner, will work a minimum 30 hours a week as operations manager. Bill Hubbs, who will own 18% of the company's stock, will work a minimum 20 hours a week as sales manager (Big Bend Ex. 3). Thus, persons owning 85% of Big Bend's stock will be integrated into the management of the new station.

51. Rio Grande proposes to integrate William L. Brooks in the management of the station. He will serve as general manager with overall responsibility for the day-to-day management and devote a minimum of 20 hours a week to the station. For purposes of this hearing, Brooks is considered as 33 1/3% stockholder in Rio Grande.[16]

52. Big Bend, with its proposal to integrate 67% of its ownership 30 hours a week and an additional 18% ownership for 20 hours a week, is comparatively a better proposal than Rio Grande's which only proposes 20 hours a week by a 33⅓% owner. Furthermore, the Big Bend integration proposal is enhanced because of Gene Hendryx's long time residence in Alpine, his extensive past broadcast experience and his active and impressive history of involvement in community service. Gene Ray Hendryx, Jr. is also a long time

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community, the diversification preference in favor of Rio Grande must be characterized as substantial.

[16] This was Brooks' interest as of the "B cut-off" date. Since then, his interest has increased to 50%.

resident of Alpine with past broadcast experience and involvement in Alpine civic organizations. Regarding Rio Grande, Mr. Brooks has been a resident of Alpine since November 1977 and has had some broadcast experience although that experience is not of a recent nature. He has had some involvement in Alpine organizations although such involvement is not as extensive as Gene Hendryx. On an overall basis, the enhancing factors greatly favor Big Bend, particularly because of the long time residence, civic participation, and superior past broadcast experience of Gene Hendryx. Thus, under integration, Big Bend's proposal is superior to Rio Grande's and Big Bend is entitled to a preference under the integration criteria. Such preference is clear, but only moderate because of the failure of Big Bend to integrate a majority of its stock ownership on a full-time basis. *Communications Properties, Inc.*, 52 RR 2d 981 (1982). Indeed, no principal of Big Bend will devote full-time to the proposed station.

Past Broadcast Record

53. In the *Policy Statement*, *supra* at 398, the Commission stated that an applicant's past broadcast record may be considered in comparative proceedings. Although a "past broadcast record within the bounds of average performance will be disregarded, since average performance is expected", the Commission noted that it is interested in "records, which, because either unusually good or unusually poor, give some indication of unusual performance in the future". Thus, it added that it would consider past records to determine whether the record shows "unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs". *Id.* By *Order* of November 23, 1982 (FCC 82M-3726), the Presiding Judge ruled that Big Bend had made a threshold showing of its "unusually good" record as licensee of KVLF-AM in Alpine, and granted the applicant leave to adduce evidence regarding that record.

54. Big Bend argues that it has an unusually good past broadcast record. In support of this argument, Big Bend first relies on a comparison of its composite week non-entertainment programming percentages with other stations serving small markets in West Texas and New Mexico. Such comparison indicates that KVLF's percentages in news, public affairs, and "all other" category rank quite favorably with the average performance of the other stations. Also, when compared individually to the other stations in individual categories, KVLF's performance ranked no less than in the top 25% in any category. Thus, on an overall basis, the performance of KVLF, when compared to other stations, is indeed quite favorable. *Minneapolis Star & Tribune Company*, 88 FCC 2d 1604 (1982); *Moline Television Corp.*, 31 FCC 2d 263 (1971).

55. Big Bend further argues that its programming has been qualitatively superior. While this claim involves a subjective matter and is difficult to evaluate, it nevertheless appears that KVLF has presented specific programming to meet the needs and interests of Alpine and such programming has been well regarded by the community. Specifically, the station has received commendations, proclamations and awards from local and area public officials and service organizations praising KVLF for its service to the community. On the basis of the record developed by Big Bend, it is concluded that KVLF's past broadcast record has been unusually good and entitled to a preference. Such preference is not diminished because of an isolated forfeiture imposed on the licensee for a violation committed more than nine years ago, as argued by Rio Grande. This violation occurred during a time of heavy flooding when the licensee was providing service during a regional emergency. Thus, this forfeiture (in the amount of $250.00 for failure to use the indirect method of computation of operating power) does not diminish KVLF's past record in any appreciable way. *Community Broadcasting Corp.*, 78 FCC 2d 486 (1980). Moreover, the reporting matter discussed previously does not involve the station's broadcast service and does not appear to constitute a factor eroding KVLF's fine past broadcast record. The only factor argued by Rio Grande which perhaps impacts on the degree of the preference to be awarded to Big Bend is the fact that KVLF generally operates only the minimum number of hours required by Commission rules and its performance statistically does not significantly exceed the promises made in its renewal application.[17] Despite these factors, the past broadcast record of KVLF can be characterized as "unusually good". Nevertheless, for reasons which will be discussed later, this factor is not sufficient to carry the day for Big Bend in this proceeding.[18]

Auxiliary Power

56. Big Bend proposes to have available auxiliary power and is entitled to a slight preference for this proposal.

Summary

57. Rio Grande has received a substantial preference under

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[17] In *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 51 RR 2d 1507 (1982), the Commission noted that the renewal applicant's non-entertainment programming exceeded the amount promised in its renewal application.

[18] The Big Bend application states that "no more than 15% of programs will be duplicated" (RG Ex. 6, pg. 2). Because this statement was never amended, Rio Grande claims a preference. According to Gene Hendryx, however, the station has never had any intention of duplicating any programming. The statement was included to cover only emergency situations where duplication was necessitated (Tr. 95–96). Considering the programming information in Big Bend's application, (as noted by Big Bend in its Reply Findings) it appears that no duplication was intended.

diversification, whereas Big Bend has received a moderate preference for integration, a preference for its past broadcast record, and a slight preference for its auxiliary power. The ultimate issue is whether the substantial preference awarded to Rio Grande under diversification is sufficient to offset or overcome the other preferences awarded to Big Bend. Under the circumstances of this case, and giving effect to the importance of the diversification criteria in comparing new applicants,[19] it must be concluded that the public interest will best be served by a grant of Rio Grande's application.

58. The prevention of a radio monopoly in Alpine is here the overriding consideration and this factor transcends the other comparative factors weighing in favor of Big Bend. Thus, notwithstanding the comparative strength of Big Bend's application and its various preferences, such factors are not individually or collectively sufficient to overcome the preference Rio Grande receives under the diversification criteria. More specifically, while Big Bend has been awarded a larger number of preferences, none of them is substantial and their combined weight under the best practicable service criteria does not equal the substantial preference accorded Rio Grande for diversification. *Communication Properties, Inc.*, cited *supra*. Rio Grande will bring a new radio voice to Alpine and Big Bend will not. Indeed, a grant of Big Bend's application would create a radio monopoly in Alpine, a result hardly consistent with the Commission's diversification policy. *Thomas C. and Essie L. Collins*, FCC 83R-11, Review Board, released February 17, 1983.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276,[20] the application of Rio Grande Broadcasting Company for a new FM radio station to operate on Channel 224A in Alpine, Texas, IS GRANTED and the competing application of Big Bend Broadcasters IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH STIRMER, *Administrative Law Judge*

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[19] It is well settled that in the comparative evaluation of broadcast applicants the diversification criteria is a factor of greater significance than integration. *KBBS, Inc.*, cited *supra*.

[20] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Cordless Telephones
Rules, Amendment of
Report and Order adopted amending Part 15 to relieve overcrowding of cordless telephone channels while the Commission contemplates permanent rule provisions.
–Cordless Telephones
Gen. Docket No. 83–325

FCC 83–597

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 15 to add new interim provisions for cordless telephones	GEN Docket No. 83–325 RM-4062 RM-4075

REPORT AND ORDER

(Adopted: December 22, 1983; Released: January 10, 1984)

BY THE COMMISSION:

I. INTRODUCTION

1. A *Notice of Proposed Rulemaking* (NPRM) in this proceeding was adopted on March 31, 1983 (48 FR 16298, April 15, 1983). The instant *Report and Order* establishes interim rule provisions for cordless telephones until permanent frequencies can be found for operation of these devices.

2. Cordless telephones utilize a short range two-way radio communications link in place of the wire normally connected to a telephone handset. This allows the user the freedom to talk on the telephone anywhere throughout his home or yard without the restriction of the telephone cord. Cordless telephones presently operate without individual license under the provisions for low power communication devices in Part 15 of the FCC Rules. Most of the present generation of cordless telephones are designed so that the portable handset transmits on one of five frequencies in the 49 MHz band subject to the requirements of §§15.117 and 15.118; the base unit, which connects to the telephone line, transmits in the band 1.625 to 1.8 MHz using carrier current techniques, subject to the requirements of §15.7 of the Rules.[1]

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[1] In an *Order Granting Conditional Waiver*, adopted September 29, 1982, released October 4, 1982, 48 FR 4788, the Commission granted a waiver of Section 15.7 to

3. This proceeding was initiated in response to petitions for rulemaking from the Electronic Industries Association, Telecommunications Group, Personal Communications Section (EIA/PCS) and Mura Corp.[2], who stated that the present rules are inadequate to meet the growing demand for cordless telephones. The *NPRM* cited the following reasons for the proposal: the presently available frequencies are fast becoming overcrowded resulting in mutual interference between cordless telephones; the anticipated expansion of the AM broadcast band upwards to 1705 kHz towards the end of this decade will result in interference to cordless telephones; and, there are technical difficulties with 1.625–1.8 MHz carrier current operation, (i.e., 1.7 MHz cordless telephones are susceptible to interference from home applicances and other devices connected to the household electrical wiring, and the 1.7 MHz band is a poor match for the 49 MHz link due to substantially different radio wave propagation characteristics). The petitioners requested that 25 to 30 channels be established for cordless telephones. Both Mura and EIA/PCS suggested use of frequencies in the bands 46.6–47.0 MHz and 49.6–50.0 MHz, which are allocated for use by the U.S. Government, and additionally, EIA/PCS recommended use of the bands 74.6 to 74.8 MHz and 75.2 to 75.4 MHz, which straddle the allocation at 75 MHz for aeronautical marker beacons.

4. The Commission's decision to propose frequencies in the 46 MHz and 49 MHz bands was coordinated with and concurred in by the U.S. Department of Commerce, National Telecommunications and Information Agency (NTIA) which has responsibility for managing U.S. Government use of the radio spectrum. Specifically, NTIA, in a report which was approved by the Interdepartment Radio Advisory Committee (IRAC) and referred to the Commission by NTIA, agreed to allow interim use of the 46 and 49 MHz frequencies provided that manufacturing or importing of equipment using these frequencies is terminated after five years and provided further that marketing is terminated within six years from the date any rules become effective.[3]

5. The *Notice of Proposed Rulemaking* in this docket proposed to

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American Telecommunications Corporation for a cordless telephone. The waiver was subject to technical and other conditions and required production to terminate by October 1, 1984. Authority was delegated to the Chief Scientist to grant waivers to other manufacturers subject to the same conditions. An *Errata* to the waiver was issued on February 1, 1983, 48 FR 5928. See also the *Memorandum Opinion and Order*, FCC 83–358, adopted July 28, 1983, released August 5, 1983, reaffirming the waiver.

[2] Petition filed by the Mura Corporation on February 26, 1982, designated RM-4062. Petition filed by the Electronics Industry Association (EIA) on March 10, 1982, designated RM-4075.

[3] A copy of the "Report of Ad Hoc 184" has been placed in the official file of this proceeding and is available through the FCC duplicating contractor.

permit production of cordless telephones for a period of 5 years on 20 frequencies (10 duplex channels) in the 46 and 49 MHz bands. Marketing was to terminate one year later. With respect to a long term solution for cordless telephones, the Commission had already solicited comments on one possible method of accommodating cordless telephones. In General Docket 83–26, which proposed a new personal radio service in the 900 MHz region of the spectrum, comments had been requested as to whether cordless telephones might be made part of this new service.[4] Cordless telephone manufacturers had indicated informally that it would take 5 to 10 years to develop viable 900 MHz cordless telephones. In view of the industry's stated need for more immediate relief, the Commission elected to propose interim rules at 46/49 MHz.

6. Fourteen parties filed comments and eight parties filed reply comments in response to the *NPRM* as listed in the attached Appendix A.* The majority of commenters are manufacturers of cordless telephones. Two of the commenters, AT&T and GTE Service Corp., are telephone system operators. Three are organizations representing TV broadcast interests who focus exclusively on interference to TV reception that could potentially be caused by cordless telephones. The issues which the commenters have raised are discussed below. With the exceptions of those modifications discussed in the succeeding paragraphs, the rules are adopting herein are essentially the same as those proposed.

II. COMMENTS AND DISCUSSION

A. *Permanent provisions for cordless telephones*

7. Cordless telephone manufacturers and telephone system operators first and foremost emphasize the need for the Commission to move forward as soon as possible with permanent provisions for cordless telephones, notwithstanding the fact that immediate relief is needed by way of adoption of the proposed interim rules. The cordless telephone industry indicates that while it is receptive to a permanent frequency assignment in the 900 MHz region of the spectrum, it does not believe that cordless telephones can share frequencies with the proposed new personal radio service. Several of the commenters report that they intend to file detailed comments to this effect in the pending General Docket 83–26. Further, Electronic Industries Association, Personal Communications Section (EIA/PCS), which represents approximately fifteen cordless telephone manufacturers, states that it plans to submit a petition for rulemaking in the near future containing a specific proposal for an

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[4] *Notice of Proposed Rulemaking,* General Docket 83–26, FCC-83-19 (Released March 4, 1983), at paragraph 76.

exclusive allocation of frequencies for cordless telephones in the 900 MHz region.

8. General Electric Co. (GE), the petitioner for the new 900 MHz personal radio service, filed comments in the instant docket as a distributor of cordless telephones. GE suggests that the Commission delay a decision on a permanent allocation for cordless telephones until after the new personal radio service is established and some experience is gained with this service. This experience could then form the basis for determining whether the service is suitable for cordless telephones. This suggestion is strongly opposed by EIA/PCS, AT&T and Uniden who reply that the demand for cordless telephones is sufficiently great that it merits separate and immediate action.

9. The Commission fully recognizes the need to establish permanent provisions for cordless telephones. We will evaluate the comments filed in General Docket 83–26 and if it appears that cordless telephones can and should be accommodated within the scope of that proceeding we will act accordingly. Alternatively, if the industry believes that a separate proceeding is required, as seems to be indicated by the comments filed in this docket, we would welcome a detailed proposal.

B. *Proposed interim frequencies*

10. In addition to proposing the use of 46/49 MHz frequencies for cordless telephones, comments were solicited in the *NPRM* as to whether additional lightly loaded frequencies in the non Government land mobile bands between 30 and 50 MHz might be used for cordless telephones on either an interim or permanent basis. The frequencies, identified in footnote 11 of the *NPRM*, were not expressly proposed because it was anticipated that the wide dispersal of the frequencies would pose design problems for cordless telephones.[5] Also, it was expected that land mobile users would increase the use of these frequencies once they became aware of the light loading. EIA/PCS suggests that the frequencies in the band 30 to 50 MHz be made available for cordless telephones on an interim basis. They estimate that the 20 frequencies which the Commission proposed at 46 and 49 MHz will provide relief for only 12 to 18 months. Some manufacturers who filed individual comments estimated that the relief might last as long as 2½ years. The additional lightly loaded frequencies in the 30 to 50 MHz band should, according to EIA/PCS, be made available to provide the 5 year relief contemplated in the *NPRM*. EIA/PCS indicates that if manufacturers encounter difficulties in designing cordless telephones for the

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[5] Footnote 11 of the *NPRM* identified 30 frequencies spread throughout the 30 to 50 MHz range. The frequencies are so widely separated that it is questionable whether a single cordless telephone design could cover all the frequencies. Changes of electrical parts or retuning of circuits might be required.

entire 30 to 50 MHz band, they can merely choose to design for a part of this band, i.e. the 46/49 MHz segment.

11. The question of how long a period of relief from overcrowding will be provided by the interim frequencies at 46 and 49 MHz is a matter of speculation and we have no clear evidence that the proposed frequencies will not be sufficient until permanent provisions are in place. Moreover, there appears to be little assurance that cordless telephone manufacturers would, in fact, use the subject frequencies in the 30 to 50 MHz band if made available to them. These factors, in addition to some concerns we have about possible interference, lead us to conclude that it is inappropriate to take action on the subject frequencies in the 30 to 50 MHz region at this time. Accordingly, we have limited the interim frequencies for cordless telephones to those at 46 and 49 MHz, as proposed in the *NPRM*.

12. GTE notes that a number of the proposed interim frequencies are spaced only 15 kHz apart and contends that adjacent channel interference will occur with this spacing. No data are presented to support this contention. Existing cordless telephones operating at 49 MHz under the provisions of §§15.117 and 15.118 utilize 20 kHz channels spaced 15 kHz apart and none of the manufacturers commenting in this proceeding report difficulties with adjacent channel interference. The Commission has received reports of mutual interference between cordless telephones, and while we cannot say with certainty that adjacent channel interference has never been the cause, in our opinion this does not seem to be a significant problem. Lacking actual evidence of adjacent channel interference, we believe there is no reason to change the channel spacing at this time.

13. Mr. John S. Papay, an amateur radio operator, advises that 3 of the proposed interim frequencies, 46.79, 49.79 and 49.93 MHz, are utilized by the U.S. Army Military Affilate Radio System (MARS) program in Ohio. Consequently, Mr. Papay claims that there will be mutual interference between cordless telephones and MARS equipment in Ohio. MARS is a voluntary program whereby amateur radio operators provide communications assistance to the military using U.S. Government frequencies. In response to Mr. Papay, EIA/PCS and Uniden point out that the proposed frequencies were recommended by NTIA/IRAC as the least utilized on a nationwide basis. The use of certain frequencies by MARS in Ohio should not, according to EIA/PCS and Uniden, preclude nationwide use by cordless telephones. They assert further that with the high power operation of MARS and low power operation of cordless telephones, if interference occurs it would be to cordless telephones. We agree, in part, with EIA/PCS and Uniden. Most importantly, we would expect that if interference occurs on these few frequencies in Ohio, then vendors in that state will soon learn to avoid marketing cordless

telephones that use those frequencies. Mr. Papay's comment has been brought to the attention of NTIA for its consideration.

C. *Designation of frequency bands for base and remote units; frequency pairing*

14. In order for a cordless telephone to operate in a duplex mode (talk and listen at the same time), two frequencies must be utilized, one for transmission from the base to the remote handset and one for the remote to the base. The *NPRM* proposed no restrictions on how the 20 interim frequencies for cordless telephones might be paired or otherwise organized. This was to be left up to the discretion of each individual manufacturer. There is a clear consensus among the commenters, with the exception of Electra Corp., that certain restrictions should be prescribed for how the frequencies may be used.

15. Most of the industry request that the Commission designate the frequencies in the 46 MHz band for base units and frequencies in the 49 MHz band for remote units. This designation of frequencies is allegedly needed to preclude manufacturers from designing by chance cordless telephones that operate on complementary frequency pairs, such that two cordless telephone base units in adjacent homes or apartments might lock on to one another. According to GTE, in such a situation both telephones could go off hook and tie up telephone company central office equipment.[6] Further, a valuable cordless telephone frequency pair would be blocked. Several commenters in addition express concern that cordless telephone handsets operating on complementary frequencies might be used as walkie-talkies.

16. The industry also requests that the Commission pair the interim frequencies. This would allegedly reduce the amount of interference between cordless telephones compared with unpaired frequencies because both frequencies in each channel pair would either be vacant or receiving interference. EIA/PCS, AT&T, GE, GTE, Phone-Mate and Dynascan all advocate a pairing scheme that takes advantage of a fixed spacing of 3.06 MHz between 6 pairs of the proposed 20 frequencies. The uniform spacing would provide for design of frequency agile cordless telephones that could scan for a vacant channel. An alternative pairing scheme put forward by Mura Corp. involves use of 3.00 MHz spacing between the paired frequencies, where 5 pairs of the proposed 20 frequencies have this spacing. Mura and GTE suggest an exchange of certain frequencies with the

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[6] GTE acknowledges that this issue is related to the issue of cordless telephone security as discussed in paragraphs 20 through 27, below. However, GTE points out that it is insufficient to rely on security features alone to avoid lock-up of two cordless telephones operating on complimentary frequency pairs.

U.S. Government to increase the number of channels having fixed spacing.[7]

17. Electra is the sole opposition to designation of base unit and remote unit frequencies and frequency pairing. Electra explains that it developed and is marketing under the existing FCC Rules a cordless telephone which uses a technique that permits operation on two closely spaced frequencies in the 49 MHz band.[8] According to Electra, assignment of base/remote unit frequencies and frequency pairing will stifle innovations such as its duplex 49 MHz cordless telephone. AT&T contends that the technique utilized by Electra is not the result of marketplace forces so much as a way of dealing with FCC rules that were never intended to accommodate cordless telephones. AT&T states that there appears to be no free market justification for denying the public the benefit of channel pairing in order to preserve Electra's design. EIA/PCS, GTE, Phone-Mate and Uniden all oppose continued provision for duplex 49 MHz cordless telephones because this would allegedly create an imbalance whereby the 49 MHz frequencies are more heavily utilized than the 46 MHz frequencies. In its reply comments Electra asserts that the *NPRM* did not propose termination of duplex 49 MHz cordless telephones, and in any event, Electra feels that it should at least be allowed an adequate period to recover the development costs of its duplex 49 MHz cordless telephone.

18. We are persuaded that the risk that cordless telephones may be designed to operate on complimentary frequencies, resulting in base units interlocking and causing adverse effects on telephone company plant, warrants designation of the 46 MHz frequencies for base units and 49 MHz frequencies for remotes. Although little evidence has been submitted to support the industry's claim that frequency pairing will reduce interference, it appears that the hypothesis is correct.[9] Since reduction of mutual interference among cordless telephones would be of benefit to consumers, to manufacturers and to the telephone companies, we are prescribing frequency

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[7] The frequencies suggested for addition or substitution were 49.610; 49.630; 49.690; 49.710; 49.730; and 49.790 MHz.

[8] The Electra duplex 49 MHz cordless telephone operates under the present Sections 15.117 and 15.118 and utilizes the frequencies 49.830 and 49.890 MHz, which are the lowest and uppermost frequencies of the five that are currently available at 49 MHz. Thus the two frequencies are separated by only 60 kHz.

[9] That pairing of frequencies will reduce mutual interference between cordless telephones can be seen intuitively. For example, suppose only four frequencies were available and one user is occupying two of the frequencies. If the frequencies are paired at random, a second user will receive interference if his unit operates on either or both of the first unit's frequencies. But if the frequencies are paired in a defined way, the second user will receive interference only when his unit operates on the same pair of frequencies; the possibility of receiving interference on only one frequency is eliminated. Thus the chance or probability of receiving interference is reduced when utilizing channel pairing.

pairing. We have elected to adopt the 3.06 MHz frequency pairing recommended by the majority of commenters because this provides the highest number of uniformly spaced frequencies among those proposed. We have consulted with the Executive Branch regarding the frequencies that Mura and GTE recommend to substitute to increase the number of paired channels with fixed spacing. Due to the nature of existing operations or the density of usage on the suggested frequencies, it is believed that significantly increased interference to the cordless telephones would result. Therefore, the frequencies we are adopting are those that were proposed.

19. With regard to Electa's argument that pairing frequencies will stifle innovations, it is difficult to foresee any tangible benefits that would result from allowing manufacturers to choose their own frequency pairs. Electra has not pointed out anything substantive. We believe that the overall benefits of reduced interference outweigh the minimal risk that frequency pairing might in some way impede meaningful innovations. Under the rules we are adopting, Electra will be permitted to continue to produce its dual 49 MHz cordless telephone until October 1, 1984, which as discussed in paragraph 31 below, is the same termination date that applies to all other current generation cordless telephones. Whether Electra's situation is sufficiently unique that it should be allowed a longer period is not an issue to be considered in this proceeding. We note, however, that the Electra unit has already been on the market for at least 2 years, and so it seems likely that Electra will amply recover its development costs.

D. *Cordless telephone security*

20. Proposed §15.232(g) stipulated that "A cordless telephone system shall provide some minimum means of preventing the base unit from either being engaged by an outside party or unintentionally going off-hook and seizing local telephone network loops." This proposed requirement stemmed primarily from comments submitted by one telephone company that cordless telephones could cause billing and other problems for telephone companies unless these devices are properly designed. While the commenters agree that such a requirement may be necessary, they are divided about what should be considered a "minimal means" of protection. The cordless telephone industry refers to the ability of a cordless telephone to reject outside users or spurious signals as cordless telephone security. We will use the same term herein to refer to the subject requirement.

21. GTE explains that it is seriously concerned about how inadequate cordless telephone security might adversely impact on telephone company operations. GTE describes a number of scenarios where the telephone company would be left to resolve problems caused by poor cordless telephone security. For instance, a user may

discover he can obtain a dial tone from a neighbor's base unit and proceed to make toll or obscene calls. Or, a user may have the same security combination as a neighbor's base unit and unwittingly dial a call through his neighbor's base unit. Or, if a cordless handset engages two base units and a call is placed to something like an airline reservation desk, two reservation clerks would receive the call and, due to the crosstalk, the telephone company would likely receive an "others on line" report by the reservation desk. GTE reports that it has heard of two incidents where cordless telephones dialed 911 as a result of responses to spurious signals. AT&T does not elaborate on how it perceives that inadequate cordless telephone security may affect telephone company operations. However, AT&T contends that the proposed rule implies that manufacturers need only make some minimal effort to achieve security and suggests that the rule be amended to require that manufacturers do whatever is necessary.

22. Because of these potential problems, many cordless telephones currently marketed are designed to provide some security protection.[10] Many units are designed to completely lock out the base unit radio receiver when the remote handset is in the base unit's cradle. Since it is obvious that often the handset will not be left in the cradle but will be kept at another location in the house, the lock out feature is therefore sometimes supplemented with one of two types of security techniques. Probably the more widely used technique involves transmission of one or more guard tones in addition to the main voice signal. The tones, inaudible to the user, must be present for the base unit to respond and dial out a call. For technical reasons this technique is limited to a few unique combinations per channel.[11] The second approach to cordless telephone security, which seems to be growing in popularity, is to transmit a digitally coded signal to "unlock" the base unit. This approach generally allows several hundred code combinations per channel and is similar to the technique utilized by garage door opener controls.[12]

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[10] While manufacturers are presently required to submit applications for equipment authorization of cordless telephones, information is not required concerning security features and how they function. Our information on current cordless telephone security features comes in part from a review of what material has occassionally been submitted with equipment authorization applications and in part from a number of articles appearing in technical magazines.

[11] Usually the guard tones employed by cordless telephones range somewhere between 4 and 7 kHz. The handset will ordinarily contain an oscillator to generate the tones and the base unit will contain a tuned circuit which responds to the tones. There are several constraints which limit the number of combinations a manufacturer might achieve using guard tones: as higher frequency tones are used, wider transmitter and receiver bandwidths are required; tones spaced closely together require greater selectivity to distinguish them; and use of multiple tones requires more complex and likely more expensive circuitry.

[12] Garage door openers generally transmit a train of digital pulses to "unlock" the

23. The commenters express diverse opinions on what the Commission should consider an acceptable minimal means of security. GTE explains that at least 500 codes per channel are needed in order to ensure that there is a reasonable chance that two cordless units within range won't have the same combination. This is based on GTE's understanding of what the garage door industry found to be necessary for garage door controls and upon a limited analysis.[13] Phone-Mate concurs with GTE. Mura suggests that cordless telephones be required to have at least a level of security provided by dual combination guard tones or a digital coding scheme that accommodates at least 64 differnt code combinations. Uniden asserts that single guard tone technology will provide adequate protection against the situations described by GTE and requests that the Commission expressly state that guard tones are acceptable.

24. EIA/PCS opposes any requirement calling for a minimum number of codes or combinations and states that some manufacturers are developing security techniques where the number of combinations would be irrelevant. The Section strongly believes that competitive marketplace forces will ensure that sufficient security levels will be achieved. EIA/PCS states that the Commission staff should determine what is a minimally acceptable means of security on a dynamic basis, taking into account a number of factors including the number of channels used by the product, the state-of-the-art and the real danger of harm to the network.[14]

25. We are not convinced that the potential problem of inadequate cordless telephone security is as severe as GTE describes. While GTE has concluded that 500 codes per channel are needed to prevent disruption of telephone company operations, it neglects to take into account several factors which tend to lessen the chances of cordless telephone interactions. To begin with, although several cordless telephones might be operated near each other, in all likelihood only a few would utilize the same channel. Then, we can assume that, consistent with the present generation of cordless telephones, most of these units will have some form of security

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receiver and hence open the door. Usually the sequence of the pulses can be adjusted by the user to form 250 or more combinations of pulse sequences. This is accomplished by setting a series of switches in both the garage door opener transmitter and receiver to have the identical on/off sequence.

[13] GTE claims that the chance of two cordless telephones having the same combination is similar to the so called "Birthday Paradox"—a probability analysis which shows that even among a small number of people there is a surprisingly good chance that two will have the same birthday. GTE uses the analysis to compute that with 500 codes, the 50/50 probability of duplication occurs for 27 users. This analysis appears to be oversimplistic for the reasons indicated in paragraph 25.

[14] A definition of harm to the telephone network can be found in Section 68.3(g) of Part 68. While inadequate cordless telephone security may not physically damage telephone equipment, any resultant misbilling due to use of these devices could be construed as harm to the telephone network under the definition in Part 68.

protection. In order to interact, two units would have to be in the receive mode (handset removed from its cradle), the security techniques of each would have to be similar and they would have to be set for the same 'combination'. A cordless telephone using guard tones for security may be immune to one using digital coding, and vice versa.[15]

26. Further, we note that there is little evidence in the record before us of external costs—*viz.*, costs to users other than the cordless phone customer without a security system. There is no evidence, for example, that without security systems tie-ups in the telephone company central office equipment would result like those which have led us to require, henceforth, the pairing of frequencies. In addition, we have been presented with no information on the extent to which misbillings actually occur, on how the telephone companies are handling the problem, or on the cost incurred by telephone companies because of misbilling. At the same time, we have no information as to the cost to manufacturers of including security devices, a cost that would likely be passed on to the consumer.

27. In light of this lack of information, we find insufficient justification for imposing a regulation mandating security systems at this time. This conclusion is particularly warranted because marketplace forces have already served to bring about security features on most cordless telephones. We expect, as suggested by EIA/PCS, that marketplace forces will bring about still further improvements in cordless telephone security systems. In our view, it is preferable to allow the consumer to decide the degree of security protection he requires and cost he is willing to pay rather than prescribing specific minimal design requirements for security systems. For instance, someone who lives in a remote area may have little if any need for a security system for his cordless telephone. By contrast, someone who lives in a city would gain almost no protection from a minimal security system, such as a 3-code system, which would afford little or no safeguards against nearby users who do not coordinate with other cordless telephone owners operating on the same pair of frequencies. Indeed, we are concerned that if we mandate a specific minimal security system, some consumers might be misled into believing that, by purchasing an "FCC security-approved system," they were purchasing a system that would provide complete security, when that is not a fact. In lieu of a design requirement, we have determind to initiate a notice of rulemaking in this docket, contemplating a labelling requirement for cordless telephones, whereby the prospective purchaser would be informed of the security features that

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[15] GTE's recommendation to require 500 codes per channel would be tantamount to mandating use of digital coding. If all cordless telephones utilized digital coding then the advantage of possible noncompatibility of techniques is lost.

prevent others from dialing calls through that unit. By ensuring that the potential problem of inadequate cordless telephone security is brought to the consumer's attention, we expect that the marketplace would provide appropriate security features best suited to the individual consumer's needs. Thus, the security concerns expressed by parties in this proceeding could be accommodated without the Commission mandating a security requirement.

E. *Technical requirements*

28. Electronic Industries Association/Consumer Electronics Group (EIA/CEG), representing manufacturers of television receivers, points out that the fourth harmonics of the proposed interim cordless telephone frequencies at 46 and 49 MHz fall within television channels 9 and 11, respectively. EIA/CEG explains that the spurious emissions limits proposed in §15.232(d) are insufficient to protect reception of a Grade B contour signal on television channels 9 or 11 if an indoor antenna is used and the cordless telephone is only 3 meters away. EIA/CEG recommends 60 dB suppression of 4th harmonics from cordless telephones. The National Association of Broadcasters (NAB) and the Association of Maximum Service Telecasters, Inc. (AMST), which both represent television broadcasters, echo EIA/CEG's concern. Uniden and EIA/PCS reply that the fourth harmonic of present 49 MHz cordless telephones falls on television channel 11, and is suppressed only 26 dB. They also point out that the FCC proposal represents an additional 10 dB suppression of the 4th harmonic and question the need for 60 dB of suppression. We believe EIA/CEG's assumptions are overly conservative.[16] For instance, in an area where only a Grade B television signal is available it is more likely that an outdoor aerial would be used. Also, a user can correct any interference to his own TV reception by increasing the separation distance. While we have received at least one report of interference to TV reception (on TV channel 2) caused by a cordless telephone, there is little evidence at this time of significant interference caused by harmonic emissions from cordless telephones. In light of these factors we are adopting the proposed spurious emissions limits. The spurious emissions requirement has been renumbered from the proposal and is set forth in Section 15.233(d).

29. EIA/PCS requests a slight modification of the proposed spurious emissions requirement with respect to the modulation products on either side of the fundamental frequency. Present cordless telephones operating under §15.118 are subject to a spurious

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[16] The proposed spurious emissions limits are identical to those in place for personal computers, adopted in FCC Docket No. 20780. For a discussion of these limits see paragraphs 44 thru 47 of the *Order Granting in Part Reconsideration* in Docket No. 20780, adopted March 27, 1980, released April 9, 1980, 45 FR 24154, April 9, 1980.

emissions limit of 500 microvolts per meter (uV/m) measured at 3 meters distance. As mentioned above, the Commission's proposal called for a tightening of this requirement to further control the interference potential to television broadcast and other radio services. While EIA/PCS is willing to accept the tighter limits, it requests a slight modification to allow 500 uV/m in the 10 kHz bands just above and below the authorized band. This request is made to accommodate the modulation products attributable to the use of guard tones for security purposes. We believe that imposing a field strength limit in a 10 kHz band would be a somewhat unorthodox approach to limiting modulation products and would at least be inconvenient from a measurement standpoint.[17] The more appropriate approach to this problem is modification of the provisions pertaining to the emission bandwidth. Accordingly, the rules we are adopting in §15.233(b) provide the relaxation EIA/PCS requests but are based on limits on emission bandwidth. The procedure to determine compliance with this requirement is a practical one that is used for other transmitters.

30. Several of the commenters request clarification of proposed §15.232(e) which calls for the cordless telephone to be completely self contained with the antenna permanetly attached. They ask that this requirement be modified to explicitly permit designs that allow the user to conveniently replace a broken antenna with one of the same kind. Apparently antenna breakage occurs frequently with cordless telephones. The manufacturers point out that many current generation cordless telephones provide user serviceable antennas under the 'self contained' requirement of §15.118(e). We are expanding the proposed requirement and renumbering it as §15.233(e) to specifically allow antenna attachment designs that facilitate replacement of broken antennas. However, we will not permit use of standard electrical connectors that would allow replacement with an antenna of a different type or use of external radio frequency amplifiers. Manufacturers also request that the requirement that the device be self-contained should be interpreted to allow operation while connected to a battery charger. Experience has indicated that the transmitter output signal is affected only minimally by connection of a battery charger. Accordingly, §15.233(e) has been rewritten to specifically permit operation while connected to a battery charger.

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[17] In order to determine the levels of modulation products it is necessary to apply a standard input signal to the device. It would be cumbersome to carry the instruments necessary to generate this input signal out to an open field test site where field strength measurements are normally performed. Tests to determine emission bandwidth and levels of modulation products are therefore normally performed at a laboratory bench. Aside from this, there are other measurement difficulties posed by a field strength limit for closely spaced emissions in a 10 kHz band.

F. *Implementation/Termination dates*

31. Fanon/Courier requests that the new rules for cordless telephones not be finalized until April, 1984 to avoid any disruption of the 1983 Christmas marketing season. Evidently it is concerned that consumers may not purchase present generation cordless telephones if they are aware that new models will be available in the near future. In view of the fact that all other manufacturers request immediate action to adopt the proposed interim provisions, we must assume that the concern expressed by Fanon Courier is of minor importance to the cordless telephone industry. Moreover, the issue raised by Fanon Courier is practically moot at this point in time. Accordingly, we see no reason to delay these rules. A number of the commenters point out that the proposal did not include any termination dates for cordless telephones operating under the present rule provisions. They state that unless the Commission takes this measure, there would be overlap and potential contradiction between the general provisions for 49 MHz low power communications devices as set forth in §§15.117 and 15.118 and the new interim provisions for cordless telephones. Most suggest that production of current generation cordless telephones be required to cease by October 1, 1984. This is the production termination date the Commission established as a condition for waiver of §15.7 for cordless telephone 1.7 MHz carrier current transmitters.[18] We agree that a termination date for present generation cordless telephones should be stated in the rules and are amending §15.117 to require production to terminate by October 1, 1984.

32. Several of the commenters request modification of the termination dates for the interim provisions. They state that the termination for manufacturing cordless telephones under the new provisions should be set at either 5 years after the interim rules are adopted or 2 years after permanent rules are adopted, whichever is later. As we indicated earlier, at this time we expect to have permanent rule provisions in place soon enough to make a smooth transition from the interim rules. We are therefore prescribing a fixed 5 year cut-off date on production under the interim provisions. Several manufacturers also oppose the proposed requirement that marketing cease one year after production. They state that this will create a situation whereby many retailers may be forced to sell off surplus at a loss. As an alternative, it is suggested that the marketing cut-off only be applied to marketing by manufacturers or importers; not to retailers. In our view, one year should be sufficient to complete sales of these cordless telephones once manufacture ceases, particularly since the cut-off date is known well in advance.

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[18] See footnote 1, supra.

We are therefore adopting the one year cut-off marketing after production ceases.

G. *Miscellaneous issues*

33. The proposed rules included a requirement that cordless telephones carry a label that alerts consumers that the device may not ensure privacy of conversations. Mr. Samuel H. Beverage, commenting as a purchaser of a cordless telephone, complains that this is not sufficient. Mr. Beverage explains that the consumer may not be aware when buying the device that it employs radio and conversations may not be private.[19] He suggests that cordless telephones be required to either employ voice scrambling or have a beeper that warns the incoming caller that the conversation may not be private.

34. We do not believe that a design requirement to ensure privacy is the appropriate approach. Consumers must share some responsibility for evaluating the advantages and limitations of cordless telephones before deciding whether to purchase such a device. We believe that the statement about privacy on the label will be plainly visible to consumers who inspect the product before purchase and it gives adequate warning. The lack of privacy when using cordless telephones has been discussed in any number of consumer articles about these devices and obviously many people are willing to accept the risk. Mandating voice encryption would surely increase the price of cordless telephones quite substantially. It is best left up to the individual consumer to decide whether this feature is needed and the added cost is warranted. While we are unaware of any voice secure cordless telephones available at this time, we have heard informal reports that such designs are being developed.

35. Several parties objected to the proposed requirement that a warning label be carried on both the cordless telephone base and remote units advising the user that interference must be accepted and conversations might not be private. GTE, Dynascan, Phone-Mate and Matsushita request that the information be required to be put in the user instruction manual instead of on labels. They argue that there is little space for such a label on the remote unit and that the label is aesthetically unpleasing. Dynascan suggests that alternatively the label be put only on the base. We believe that this information is of sufficient importance that it should be put on the equipment where it can be readily seen by anyone who might use the cordless telephone. However, in view of the concern about space for the warning label on the handset, we are requiring that it be carried only on the base unit.

36. GTE recommends that the Commission prescribe limits on

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[19] The Commission has received a number of complaints similar to Mr. Beverage's, both in writing and by telephone.

RF energy that may be coupled to the telephone line by cordless telephones. GTE is apparently concerned that manufacturers may attempt to use the telephone wiring as an antenna similar to what is being done now with the 1.7 MHz carrier current link used by present generation cordless telephones. This, according to GTE, could result in harm to the telephone network. While the telephone wiring may perform well as an antenna at 1.7 MHz where the wavelength is long, we suspect that it would yield poor performance at 46 MHz where the wavelength is much shorter. Accordingly, we have little reason to believe that manufacturers will design the 46 MHz cordless telephones to use the telephone line as an antenna for the transmitter. A limit on RF energy coupled to the telephone line does not appear to be needed.

IV. Final Regulatory Analysis

37. Pursuant to 5 USC 601 et seq. an Initial Regulatory Flexibility Analysis was incorporated in paragraph 12 of the *Notice of Proposed Rulemaking*. In paragraph 14 of this *NPRM*, written comments on this Analysis were solicited with the same filing deadlines as comments on the rest of the Notice. No comments in response to this request were received.[20]

A. Need for and objective of rule.

38. The Commission is establishing interim frequencies for cordless telephones. The existing general rule provisions that these devices have been operating under are considered by manufacturers to be inadequate to meet the growing consumer demand for these devices.

B. Summary of issues raised in comments on Initial Analysis

39. No comments were received specifically concerned with the Initial Regulatory Flexibility Analysis in the Notice in this proceeding. Since these rules do not impose any new reporting or record keeping requirement, there is no deleterious economic effect on manufacturers of cordless telephones whether a small business or large. In fact, since these rules will facilitate continued growth of the cordless telephone industry, the effects will be beneficial.

C. Significant alternatives

40. The regulations adopted herein respond to petitions from the cordless telephone industry seeking special rule provisions and additional frequencies for cordless telephones. This action is in line

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[20] Fanon Courier refers to the Initial Regulatory Flexibility Analysis in the heading of its comments. However, Fanon Courier's comments are clearly aimed at specific issues in the *NPRM* and not at the Commission's Initial Regulatory Flexibility Analysis.

with the petitions, except that the provisions will be made available only for limited period to allow time to consider permanent frequencies and rule provisions. No other significant alternatives are apparent.

V. ORDERING CLAUSES

41. Pursuant to the above and under the authority of §§4(i), 302 and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED THAT Part 15 is amended as set out in Appendix B of this Order.

42. IT IS FURTHER ORDERED that this amendment shall become effective February 15, 1984. Applications for certification of cordless telephones under these rule provisions will not be accepted before February 15, 1984.

43. For further information concerning this Order contact Mr. Julius Knapp, Office of Science and Technology, telephone (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendix A– may be seen in FCC Dockets Branch, Room 239, 1919 M St., N.W., Washington, D.C. 20554

APPENDIX B

Part 15 of the FCC Rules (47 CRF Part 15) is amended as follows:

1. The table of contents of Part 15 is amended by adding a new subheading at the end of Subpart E and titles of new rule Sections to read as follows:

* * * * *

CORDLESS TELEPHONES

15.231 Interim provisions for a cordless telephone
15.232 Interim frequencies for cordless telephones
15.233 Technical specifications
15.234 Report of measurements
15.235 Certification requirement
15.236 Labelling and identification requirements for a cordless telephone
15.237 Non-interference requirement

2. Section 15.117 is amended by designating the present text as paragraph (a) and by adding a new paragraph (b) to read as follows:

§ 15.117 *Operation between 49.83 - 49.90 MHz*

* * * * *

(b) The manufacture of a cordless telephone using the frequencies in paragraph (a) of this section under the provisions of § 15.118 shall cease October 1, 1984. All cordless telephones manufactured after October 1, 1984 shall conform to the requirements in §§ 15.231 - 15.237, inclusive.

3. Subpart E of Part 15 is amended by adding a new undesignated heading immediately following § 15.228 and by adding new §§ 15.231 - 15.237 to read as follows:

CORDLESS TELEPHONES

§ 15.231 *Interim provisions for a cordless telephone*

A cordless telephone may be operated without an individual license, subject to the requirements of §§ 15.231 - 15.237, inclusive. The manufacture and importation of such devices shall cease February 15, 1989 and the marketing shall cease February 15, 1990.

§ 15.232 *Interim frequencies for cordless telephones*

A cordless telephone shall be operated on one or more of the following frequency pairs, provided it complies with the provisions in §§ 15.231 - 15.237, inclusive.

Channel	*Base Transmit*	*Handset Transmit*
1	46.610 MHz	49.670 MHz
2	46.630 MHz	49.845 MHz
3	46.670 MHz	49.860 MHz
4	46.710 MHz	49.770 MHz
5	46.730 MHz	49.875 MHz
6	46.770 MHz	49.830 MHz
7	46.830 MHz	49.890 MHz
8	46.870 MHz	49.930 HMz
9	46.930 MHz	49.990 MHz
10	46.970 MHz	49.970 MHz

§ 15.233 *Technical specifications*

A cordless telephone shall comply with all the technical specifications in this section.

(a) Frequency tolerance of carrier: + 0.01%. The tolerance shall be maintained for a temperature variation of - 20° C to + 50° C at normal supply voltage, and for variation in the primary voltages from 85% to 115% of the rated supply voltage at a temperature of 20° C.

(b) Emission shall be confined within a 20 kHz band centered on the authorized carrier frequency. Modulation products falling within 10 kHz above or below this 20 kHz band shall be attenuated at least 26 dB below the level of the unmodulated carrier. Tests to determine compliance with this requirement shall be performed using an appropriate input signal as prescribed in § 2.989 of this chapter.

(c) The field strength of the carrier frequency shall not exceed 10,000 uV/m at 3 meters.

(d) Harmonics and other out-of-band emissions, on any frequency more than 20 kHz removed from the authorized center frequency shall comply with the field strength limitations in the following table:

Frequency (MHz)	*Field Strength* (uV/m at 3m)
25 to 88	100
88 to 216	150
216 to 1000	200

The spectrum shall be scanned from 25 to 1000 MHz and all signals exceeding 20 uV/m at 3 meters shall be reported.

(e) The cordless telephone shall be completely self-contained except for the power line cord and wiring for connection to the telephone line. This provision does not prohibit operation while connected to a battery charger. The antenna shall be permanently attached to the enclosure containing the phone. The manufacturer may design the unit so that a broken antennas can be replaced by the user; however, use of an antenna jack or standard electrical connector is prohibited.

(f) A cordless telephone which receives electrical power from the public utility power lines shall limit the radio frequency voltage coupled back into the powerlines to less than 100 uV on any frequency below 30 MHz. A device which is designed to utilize a battery charger is subject to this requirement. Measurements shall be performed in accordance with the appropriate parts of IEEE Standard 213. (See § 15.75 of this Part.)

§ 15.234 *Report of measurements*

The report of measurements for a cordless telephone operating under § 15.233 shall contain the information required by § 15.143.

§ 15.235 *Certification requirement.*

Both the base station and portable handset of a cordless telephone shall be certificated by the Commission pursuant to the procedures in Subpart J of Part 2. Certification is a prerequisite for legal marketing and use. The transmitter portion of the cordless telephone shall be certificted to show compliance with the requirements in §§ 15.231 - 15.237, inclusive. The receiver portion shall be certificated to show compliance with the requirements in Subpart C of this Part. A single application for certification *(FCC Form 731)* may be filed for a cordless telephone system provided it clearly identifies and provides data for all parts of the system to show compliance with the applicable technical requirements.

NOTE: A cordless telephone, which is intended to be connected to a public telephone network shall also comply with regulations in Part 68 of this Chapter. A separate application for registration under Part 68 is required.

§ 15.236 *Labelling and identification requirements for a cordless telephone.*

Both the base station and portable handset of a cordless telephone system shall be identified and labelled pursuant to §§ 2.925, 2.926 and 2.1045 of Part 2 of this Chapter. In addition, the label attached to the cordless telephone base station shall contain the following statement:

> "This cordless telephone system operates under Part 15 of FCC Rules. Privacy of communications may not be ensured when using this phone. Operation is subject to two conditions: 1) it may not interfere with radio communications; and 2) it must accept any interference received, including that which may cause undesirable operation."

When a single application for certification of a cordless telephone system is submitted in accordance with § 15.236, both the base station and portable handset may carry the same FCC Identifier.

§ 15.237 *Non-interference requirement.*

Notwithstanding compliance with the technical specifications herein, a cordless telephone is subject to the general conditions of § 15.3 of this part. The operator of a cordless telephone may be required to stop operating his device upon a finding that the device is causing harmful interference and it is in the public interest to stop operation until the interference problem has been corrected.

Agreement to withdraw Application Settlement

Joint settlement agreement approved subject to condition that provisions creating a covenant not to compete shall be stricken by the parties as a prerequisite to grant of construction permit. -*Dayton Telecasting, Inc.*
BC Docket No. 81–617

FCC 83R–97

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
DAYTON TELECASTING, INC. Dayton, Ohio	BC Docket No. 81–617 File No. BPCT-800430KI
CHANNEL 45, INC. & OPPENHEIMER & CO. d/b/a CHANNEL 45 COMPANY Dayton, Ohio	BC Docket No. 81–618 File No. BPCT-800123KE
SINDER BROADCASTING OF OHIO, INC. Dayton, Ohio	BC Docket No. 81–619 File No. BPCT-800718KE
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: November 28, 1983; Released: December 1, 1983)

BY THE REVIEW BOARD: BOARD CHAIRMAN MARINO DUBITANTE

1. By *Initial Decision*, FCC 83D-26, released April 22, 1983, Administrative Law Judge Stirmer granted the application of Sinder Broadcasting of Ohio, Inc. (Sinder) for a construction permit for a new commercial television station to operate on Channel 45, Dayton, Ohio and denied the competing applications of Dayton Telecasting, Inc. (Dayton Telecasting) and Channel 45 Company (Channel 45). Now before the Review Board for consideration are: (a) a joint request for approval of agreement filed November 14, 1983 by Dayton, Channel 45, and Sinder; (b) petitions for leave to amend filed by Channel 45 on April 26, May 5, and July 25, 1983; (c) a petition for leave to amend filed June 30, 1983 by Sinder; and (d) a motion for

leave to amend filed July 7, 1983 by Dayton Telecasting. The joint settlement agreement provides for the grant of the Dayton Telecasting application and the dismissal of the Channel 45 and Sinder applications, and contains the requisite showing that the applications were not filed for the purpose of reaching or carrying out the agreement. *See* 47 U.S.C. § 311(c), as amended. We have reviewed the agreement and, with the exception of the matter herein-below discussed, find that in all other respects approval of the agreement will serve the public interest and should be granted. *See* Section 73.3525(a) of the Rules, 47 CFR § 73.3525(a).

2. The singular sticking point occurs because the parties have included in their agreement a covenant not to compete by the withdrawing parties.[1] However, in what appears to be the seminal precedent, *James S. Rivers, Inc.*, 26 FCC 4 (1959) ("Rivers"), the Commission refused to approve a settlement and withdrawal agreement containing a similar covenant and held:

> . . . that, because it believes that it is contrary to the public interest for participants in a proceeding to preclude by a private agreement the future filing of applications which might involve improvement in service to the public, the Commission does not approve the agreement made between James S. Rivers, Inc. and F. Keith Brown insofar as the said agreement would limit the filing of any applications for new or improved service by any applicant in which Mr. Brown had an interest.

Id. Rivers, of course, has been faithfully applied by the Board, *see, e.g., North Atlanta Broadcasting, Co.*, 25 RR 715 (Rev. Bd. 1963); *Romac Baton Rouge Corp.*, 8 FCC 2d 304 (Rev. Bd. 1967); *Augusta Telecasters, Inc.*, 10 FCC 2d 594 (Rev. Bd. 1967); *Viking Television, Inc.*, 16 RR 2d 862 (Rev. Bd. 1969); *Durham-Raleigh Telecasters, Inc.*, 12 FCC 2d 325 (Rev. Bd. 1968); *Faith Tabernackle, Inc.*, 69 FCC 2d 30 (Rev. Bd. 1977). The Commission itself, in *Central Coast Broadcasters, Inc.*, 29 FCC 2d 465 (1971), has since reaffirmed its basic holding in *Rivers*.[2] In their joint filing, the parties have not directly addressed the *Rivers* line of cases despite the fact that the precedents have been consistently followed and have not been overruled.[3] [4]

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[1] That convenant provides:

> *Covenants Not to Compete*. Sinder Broadcasting of Ohio, Inc., Alfred M. Sinder, Channel 45 Co. and Michael Finkelstein agree by their signatures hereon for a period of five years from the date of this Agreement not to acquire, directly or indirectly, any ownership interest in, accept employment with, or provide financing to any commercial television broadcast station licensed to Springfield or Dayton, Ohio, or Richmond, Indiana; provided however that these parties may perform services for DTI at Channel 45 as may be required pursuant to Section 7 hereof.

Agreement, para. 6.

[2] The only exception recognized in the cases pertains to covenants not to compete contained in agreements to transfer station licenses. *See Raul Santiago Ramon*, 38 FCC 2d 290 (Rev. Bd. 1965). We acknowledge, however, that the basis for the distinction in these two separate lines of cases is not simple to explain.

3. Therefore, as the Commission did in *Rivers* (and as the Board emulated in *North Atlanta, see* 25 RR at 718a), we shall approve the tendered agreement subject to the condition that paragraph 6 thereof ("*Covenants Not To Compete*") is specifically not approved and shall be striken by the parties as a prerequisite to the grant of

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[3] For example, in *North Atlanta, supra,* the Board indicated that - in deference to the Commission's holding in *Rivers* - a settlement and withdrawal agreement containing a covenant not to compete would not be approved absent "a clear and convincing public interest showing" that the concerns reflected in *Rivers* were not applicable in that specific case. *See* 25 RR at 718. While the instant parties have by letter of November 17, 1983 attempted to assert that their covenant is sanctioned by common law and is reasonable insofar as its slight effect on potential competition, the letter again does not address either *Rivers* or *North Atlanta.* Further, although the letter contends that "[t]here are no vacant commercial TV channels allocated to Dayton, Springfield or Richmond" for which the withdrawing applicants could potentially apply, the covenant under discussion is broader in its scope than implied in the parties' letter. It would, for instance, preclude the withdrawing covenantors from buying any interest in an existing station in those specified cities and seeking to improve the service. *See supra* note 1. We might also add that if - as the parties' letter contends - the subject covenant will have no "practical" effect on broadcast service in respects relevant here, our striking of that covenant can have, of course, no greater corresponding effect.

[4] At the same time, the Board is aware that many circumstances and regulatory attitudes have changed greatly since the Commission last spoke to this matter in 1971. Thus, the strong desirability of settlement agreements in comparative cases was cogently stated not too long ago by former Chairman Ferris. *See Country-Politan Broadcasting, Inc.*, 68 FCC 2d 640 (1978) (concurring statement). Chairman Ferris' viewpoint was recently adopted by Congress when it intentionally relaxed the Communications Act so as to remove all unnecessary impediments to settlement and dismissal agreements. *See* 47 U.S.C. §311(c), as amended by Pub. L. 97–259, 96 Stat. 1087, 1095, approved Sept. 13, 1982. It said: ". . . dismissal agreements generally serve the public interest because they often avoid lengthy hearing appeals, thus expediting the start of the new broadcast service." Conference Report No. 97–765, 97th Cong., 2d Sess. 50 (1982). Equally significant, perhaps, is the fact that since the 1959 decision in *Rivers*, the number of broadcast stations has increased enormously. In 1959 there were only 3906 commercial radio and 475 commercial television stations licensed in the U.S. *FCC Annual Report* (1959), at 73–74; however, the Commission's latest tally shows 8181 licensed commercial radio and 857 commercial television stations. *Public Notice (Broadcast Station Totals for July 1983)*, Mimeo 6468, released September 13, 1983. Hence, it is more than possible that the underlying concern of *Rivers* - *i.e.,* that no private agreement unduly impede the growth of broadcast service - might not be particularly pertinent today when a far greater number of broadcast services are available in virtually every geographic region. Consequently, while *Rivers* might still represent controlling case law, its policy concerns may have been overtaken by collateral events and we are not certain that the present Commission would have the same negative policy view today regarding otherwise reasonable covenants not to compete. Nonetheless, and as we recently noted in *San Joaquin Television Improvement Corp.*, FCC 83R-91, released November 16, 1983 (at para. 13), the "Board . . . has no license to modify or ignore Commission precedent." Until the Commission itself readdresses this narrow matter, the Board is constrained to continue to apply *Rivers* and its progeny cases.

the construction permit. However, in view of our discussion in note 4, *supra*, questioning whether the basic *Rivers* policy has, in fact, survived changing circumstances, the parties to this agreement may wish to bring the issue directly to the Commission by way of a prompt appeal of this order.

4. ACCORDINGLY, IT IS ORDERED, That the motion for leave to amend filed July 7, 1983 by Dayton Telecasting, Inc.; the petitions for leave to amend filed April 26, May 5, and July 25, 1983 by Channel 45 Company; and the petition for leave to amend filed June 30, 1983 by Sinder Broadcasting of Ohio, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and

5. IT IS FURTHER ORDERED, That the joint request for approval of agreement filed November 14, 1983 by Dayton Telecasting, Inc.; Sinder Broadcasting of Ohio, Inc.; and Channel 45 Company IS GRANTED to the extent indicated above, and

6. IT IS FURTHER ORDERED, That the application of Dayton Telecasting, Inc. (File No. BPCT-800430KI) for a new commercial television station at Dayton, Ohio IS GRANTED; and that the applications of Channel 45, Inc. and Oppenheimer and Co. d/b/a Channel 45 Company (File No. BPCT-800123KE) and Sinder Broadcasting of Ohio, Inc. (File No. BPCT-800718KE) ARE DISMISSED with prejudice; and that the proceeding IS TERMINATED.

Federal Communications Commission
Norman B. Blumenthal, *Review Board*

BOARD CHAIRMAN MARINO DUBITANTE

The covenants not to compete in this case are tied to consultancy agreements. Thus, the settlement agreement provides that "Sinder and Channel 45 Company are willing to dismiss their applications with prejudice and to offer Dayton Telecasting, Inc. covenants not to compete and consultancies in return for certain monetary consideration . . . ." The Board has previously held that a consultancy agreement for a ten-year term, a much longer period of time than that involved in the present case, was not contrary to the public interest or Commission policy. *See Texas Television, Inc.*, 91 FCC 2d 1047, *rev. denied*, FCC 83–95, released March 9, 1983. A practical effect of such a consultancy is to bar the consultant from competing with the station he is supposed to serve because of the Commission's "cross interest" policy. And State law probably forbids a consulting agent from competing with his principal station, at least in the same market.

Shortly after the adoption of *James S. Rivers, Inc.*, 26 FCC 4 (1959), an FCC Hearing Examiner considered covenants not to compete which, like those in our case, were tied to a consultancy agreement. *See Peninsula Broadcasting Corp.*, 27 FCC 129, 134–135 (1959). After carefully reviewing Commission precedent, the Hearing Examiner approved the entire agreement, including the covenant not to compete, concluding: "on the basis of the cited precedents including the *Rivers* case wherein the remaining application was granted, . . . no public interest or policy considerations militate against a grant of the Peninsula application on account of the agreements not to compete. Moreover, it is pertinent to note here that the parties who purport to bind themselves not to compete against the television operation proposed by Peninsula will have ownership or employee (consultant) interests in and with the television station; as long as those interests obtain their non-competition obligations are consonant with the duopoly policies of the Commission." 27 FCC at 153. The Commission did not disturb the findings regarding the covenant not to compete, agreeing that "a grant of the application of Peninsula Broadcasting Corp. would serve the public interest, convenience and necessity." 27 FCC at 127. Peninsula, when read together with our approval of a lengthy consultancy in *Texas Television, Inc., supra*, would seem to justify approval of the entire agreement before us.

While we are sometimes called upon to uphold ancient "established" precedent that has all but disintegrated into fine dust by the passage of time and changing circumstances (see Board Order, note 4), not even medieval faith would require the faithful to extend a precedent to a factual situation not covered by the *Rivers* case.* This is where our decision today may be faulted, especially when we recall that in *Peninsula* the Hearing Examiner did not extend *Rivers* to a covenant not to compete tied to a consultancy, and the Commission did not disturb his decision. Moreover, the covenants not to compete in the instant case are not unreasonable as to time - five years - or geographic area - the Dayton, Ohio market (ADI). *Compare Raul Santiago Roman*, 38 FCC 290 (Rev. Bd. 1965) (transfer exception to disapproval of covenants not to compete); Board Order, note 2. *See also KOBY Radio*, FCC 83M-3694, released October 18, 1983, where the ALJ and the Mass Media Bureau joined in extending the transfer case exception to a covenant not to compete in renewal circumstances.

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* In *Central Coast Broadcasters*, 29 FCC 2d 465, 466 (1971), a television station agreed not to improve service to the public by means of translators, a very different case.

FCC 83D–26

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
DAYTON TELECASTING, INC. Dayton, Ohio	BC Docket No. 81–617 File No. BPCT-800430KI
CHANNEL 45, INC. & OPPENHEIMER & CO. d/b/a CHANNEL 45 COMPANY Dayton, Ohio	BC Docket No. 81–618 File No. BPCT-800123KE
SINDER BROADCASTING OF OHIO, INC. Dayton, Ohio	BC Docket No. 81–619 File No. BPCT-800718KE
For Construction Permit	

Appearances

Richard J. Bodorff and *David Oxenford* on behalf of Dayton Telecasting, Inc.; *William S. Andrews, Mark Davison* and *Michael Finkelstein* on behalf of Channel 45, Inc. & Oppenheimer & Co. d/b/a Channel 45 Company; *Leo I. George, Donald Evans* and *Robert Rich* on behalf of Sinder Broadcasting of Ohio, Inc.; *William P. Bernton* on behalf of Freedom Broadcasting Corporation; and *Brian P. Kilbane* and *Edythe Wise* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

(Issued: April 14, 1983 Released: April 22, 1983)

Preliminary Statement

1. This proceeding was designated for hearing by Order released September 3, 1981 (BC 003177). Originally, four mutually exclusive applications were designated for hearing. Thereafter, the application of Freedom Broadcasting Corporation was dismissed pursuant to a settlement agreement approved by Order of the Presiding Judge released September 20, 1982 (FCC 82M-2912). As a result, the proceeding went forward with the applications of Dayton Telecast-

ing, Inc. (DTI), Channel 45, Inc. and Oppenheimer & Co. d/b/a Channel 45 Company (Channel 45 Company) and Sinder Broadcasting of Ohio, Inc. (Sinder) vying for the construction permit here at issue. The following issues were specified in the Order of Designation.[1]

> To determine with respect to Channel 45 Company:
>
> (a) whether, it has $2,161,000 available to construct and operate;
>
> (b) whether, in light of the evidence adduced pursuant to issue (a), applicant is financially qualified.
>
> To determine with respect to Sinder Broadcasting of Ohio, Inc.:
>
> (a) the costs of its technical equipment and the amount of the downpayment plus five monthly installment payments;
>
> (b) whether it has additional funds over $944,280 available to construct and operate;
>
> (c) whether, in light of the evidence adduced pursuant to the issues (a) and (b), applicant is financially qualified.
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. As a result of Motions to Enlarge Issues filed by DTI and Sinder, the following issue was added against Channel 45 Company by Order of the Presiding Judge released April 14, 1982 (FCC 82M-1196).

> To determine the facts and circumstances relating to the practices of Oppenheimer & Co. (Oppenheimer or OpCo) which resulted in censure by the Securities and Exchange Commission for failure to file accurate reports concerning acquisition of certain stock [SEC File No. 3–5244]; issuance of consent order by the SEC censuring Oppenheimer for violation of Sections 10(b) of the Securities and Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933 relative to the offer and sale of certain options [SEC File No. 3–5860] and censuring Oppenheimer for violations of Section 10(b) and 17(a) of the Securities and Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933 [SEC File No. 3–5258] and in light of the evidence adduced, to determine the effect upon the comparative qualifications of Channel 45 Company.

3. The financial issue directed against Sinder was addressed in an amendment filed by that applicant on October 30, 1981. Thereafter, the financial issue specified against Sinder was resolved in favor the applicant by summary decision released January 12, 1982 (FCC 82M-0096).

4. Hearings were held from July 19 to 21 and on July 26, 1982. Further hearing sessions were held on August 26 and 27, 1982. A

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[1] The specified issues relating to Freedom are omitted because of the dismissal of the Freedom application.

further hearing conference concerning the admission of exhibits was held on September 10, 1982. The record was closed by the Presiding Judge by Order released September 23, 1982 (FCC 82M-2957). By Order released October 5, 1982, the record was reopened to receive an additional exhibit. Also, the record was reopened for the limited purpose of accepting amendments filed by the three applicants and again closed by Order of the Presiding Judge released March 11, 1983.

5. Proposed findings of fact and conclusions were filed by the parties on November 10, 1982. Reply findings and conclusions were filed by the applicants on December 10, 1982.

Findings of Fact

Dayton Telecasting, Inc.

Composition of Applicant

6. DTI is an Ohio corporation. It was organized in December of 1979 for the purpose of applying to the FCC for a permit to construct a new television station on UHF Channel 45 in Dayton, Ohio (DTI Ex. 1, p. 1).

7. The officers, directors and shareholders of DTI are as follows:

Henry Posner, Jr. – Chairman, Director and 37.5% shareholder
Albert M. Holtz – President, Director and 21% shareholder
Thomas D. Wright – Secretary, General Counsel and 10.5% shareholder
David P. Grigsby – Vice President, Director and 20% shareholder
Samuel Tolbert – Vice President, Director and 10% shareholder
Fred W. Schwarz – Vice President, Treasurer, Director and 1% shareholder

(DTI Ex. 1, p. 1)

Diversification

8. The principals of DTI listed below have the following interests in West Virginia Telecasting, Inc., the licensee of WVAH-TV, Channel 23, Charleston, West Virginia:[2]

Henry Posner, Jr.	Chairman, Director	54% ownership
Albert M. Holtz	President, Director	30% ownership

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[2] WVAH-TV was granted a license by the Commission on October 8, 1982. See FCC File No. BLCT-820914KG.

Thomas D. Wright	Secretary, General Counsel, Director	15% ownership
Frew W. Schwarz	Vice President, Treasurer, Director	1% ownership

(DTI Ex. 1, pp. 6–7)

9. The shareholders listed in paragraph 8 above hold identical interests in Greater Wichita Telecasting, Inc. Greater Wichita Telecasting, Inc. is an applicant for a construction permit for a new UHF station in Wichita, Kansas. Greater Wichita Telecasting, Inc. was awarded the permit in an Initial Decision (DTI Ex. 1, pp. 6–7, 8–9). However, the decision was reversed on appeal by the Review Board. The Board awarded the permit, on comparative grounds, to Columbia-Kansas TV, Ltd., a mutually exclusive applicant. *Greater Wichita Telecasting, Inc.*, 51 RR 2d 1604 (Rev. Bd. 1982). The case is pending before the Commission on an application for review.

10. Messrs. Posner, Wright, Schwarz and Holtz have interests in several television applications that are pending before the Commission. These interests are as follows:

	Akron Telecasting, Inc., an applicant for Channel 55 at Akron, Ohio BPCT-800806KJ	*Tennessee Telecasting, Inc., an applicant for Channel 8 at Maryville, Tennessee BPCT-810615KT*	*Greater Portland Telecasting, Inc., an applicant for Channel 51 at Portland, Maine BPCT-800721KI*
Henry Posner, Jr.	54% interest, Chairman and Director	54% interest, Chairman and Director	48.5% interest, Chairman and Director
Albert Holtz	30% interest, President and Director	30% interest, President and Director	27% interest, President and Director
Thomas Wright	15% interest, Secretary and General Counsel, Director	15% interest, Secretary and General Counsel, Director	13.5% interest, Secretary and General Counsel, Director
Fred Schwarz	1% interest, Vice President Treasurer and Director	1% interest, Vice President Treasurer and Director	1% interest, Vice President Treasurer and Director

11. The Greater Portland application was set for hearing. However, the parties entered into a settlement which was filed with the Presiding Judge. Pursuant thereto, Greater Portland agreed to dismiss its application in exchange for an option under which it could purchase 12 ½% of the station during the five year period after the commencement of broadcast operations. The agreement was approved by the Administrative Law Judge in a Memorandum Opinion and Order (FCC 82M-3537) released November 9, 1982.

12. The applications for Akron and Maryville have also been

designated for hearing (Tr. 148). At the time of hearing there were a total of four mutually exclusive applications for Akron and 13 for Maryville and Knoxville (DTI Ex. 1, p. 11).

Integration

13. Persons holding 51% of DTI's stock propose to work full time at the station should DTI's application be granted. Mr. Holtz will serve full time, a minimum of forty hours a week, as General Manager. David Grigsby will serve full time, a minimum of forty hours a week, as Station Manager. Sam Tolbert will serve full time, a minimum of forty hours a week, as Vice President - Engineering, though this duties would also include supervision of various minority-directed programs proposed by DTI (DTI Ex. 3, p. 5).

14. Both Mr. Grigsby and Mr. Tolbert are Black males (DTI Ex. 2, p. 1, DTI Ex. 3, p. 1). As noted, both proposed full-time integration into management-level positions at the proposed station.

15. Mr. Holtz began his career in broadcasting in 1964 as an Account Executive with Metromedia, Inc., at WTTG-TV in Washington, D.C. Thereafter, he spent six years with CBS, Inc. at WBBM-TV in Chicago and WCBS-TV in New York. He ultimately became Sales Manager of WCBS-TV.

16. In 1971, he joined the Westinghouse Broadcasting Co. as Sales Manager for the Group W flagship station in Philadelphia, KYW-TV. He later became General Sales Manager for KDKA-TV in Pittsburgh, Pennsylvania.

17. In 1975 Holtz became General Manager of WPGH-TV, an independent UHF station in Pittsburgh. The station went from severe losses to a solid profit position during Holtz's first year there. In 1975, he was elected Vice President and General Manager and a Director of Pittsburgh Telecasting, Inc., the licensee of WPGH-TV, and assumed an equity position. Holtz had been at WPGH-TV for 3½ years when it was sold to Meredith Broadcasting Co. (DTI Ex. 1, p. 4).

18. Mr. Holtz has been involved full time over the past several years in the pursuit of construction permits for several UHF television stations. WVAH-TV, Charleston, West Virginia was a result of this pursuit. Mr. Holtz was involved in the construction of that station (DTI Ex. 1, pp. 5–6). Mr. Holtz oversaw the construction and start-up phases of operation (Tr. 159–160).

David P. Grigsby

19. Mr. David P. Grigsby worked for NBC Television in New York from September 1971 until February 1973 as Coordinator of Sales Development and Promotion/Research-Owned Stations Division. He had primary responsibility for NBC's Washington and Chicago television stations, WRC-TV and WMAO-TV, respectively (DTI Ex. 2, p. 2).

20. From February 1973 until April 1975, Grigsby worked with

Metromedia TV Sales in New York as Manager and later Director of Research and Sales Promotion. He joined Arbitron Television in April 1975 as an account executive for Eastern Television Sales, a position he held until August 1978. *Id.*

21. Later, Mr. Grigsby became President, a Director and a 30% shareholder of Drum Communications, Inc., licensee of WENZ(AM), Richmond, Virginia. He was Manager of the station supervising a staff of approximately 22 employees from late 1978 until August 1980. During his term at WENZ, the station rose from a 9th place Arbitron rating to 3rd. During this period, he was elected Second Vice President of the National Association of Black-Owned Broadcasters, a trade association consisting of principals of minority-owned broadcast properties (DTI Ex. 2, pp. 2–3). Grigsby sold his interest in Drum Communications, Inc. in December 1981, pursuant to a commitment made prior to the cut-off date (DTI Ex. 3, p. 4).

Samuel Tolbert

22. Mr. Tolbert joined the Christian Broadcasting Network, Inc. (CBN) as Director of Engineering in May of 1972. CBN, through a subsidiary, is the licensee of four independent UHF TV stations in Portsmouth, Virginia (WYAH-TV); Atlanta, Georgia (WANX-TV); Dallas, Texas (KXTX-TV); and Boston, Massachusetts (WXNE-TV). CBN distributes programming across the country by satellite to TV stations and CATV systems. He remained at CBN for nine years until May 1981.

23. Tolbert was initially hired by CBN to oversee audio matters at the two TV stations it then had in Portsmouth and Atlanta. His area of responsibility expanded soon thereafter into video. With the departure of his immediate supervisor in 1975 and the expansion of CBN into other TV markets, Tolbert supervised approximately 100 technical personnel at four CBN-owned and operated TV facilities, designing audio and video systems, selecting equipment and negotiating with vendors. He was also placed in charge of preparing CBN's technical budget (DTI Ex. 3, pp. 2-3).

24. While at CBN Tolbert did independent audio and video consulting work to supplement his income. This work covered the design of TV facilities, the production of television programming, rental of production equipment and post-production work. Over time, this business grew and ultimately in May of 1981 he elected to leave CBN and devote full time to it. Tolbert incorporated under the name of SST Enterprises, Ltd. and now is engaged in the production of television programming from start to finish with equipment owned by SST (*i.e.*, from furnishing writers, producers, directors, and graphic artists to post-production work), TV equipment leasing, and consulting relative to design and construction of TV facilities. SST has two full-time employees and employs nine or ten others from time to time.

25. Messrs. Holtz, Grigsby and Tolbert each intend to establish their residence in Dayton, Ohio should the DTI application be granted (DTI Ex. 1, p. 3; DTI Ex. 2, p. 1; DTI Ex. 3, p. 4).[3]

Channel 45 Company

Composition of Applicant

26. Channel 45, Inc. and Oppenheimer and Co. d/b/a Channel 45 Company is a limited partnership established under the laws of the state of Ohio (Channel 45 Ex. 1, p. 1). The limited partners would own 40% of the equity of the corporation; the general partner the other 60% (Tr. 344). The general partner is Channel 45 Company.

27. The current officers, directors and stockholders of Channel 45 Inc. are as follows:

Name	*Office*	*Shares Held*	*Percentage of Shares Held*
Richard I. Adrian	President/ Chairman	200	33⅓%
David B. Harper	Exec. Vice President Treasurer Director	100	16⅔%
Michael Finklesteinn	Secretary/ Director	100	16⅔%
Ro Nita Bernice Hawes	—	33⅓	5⅔%
Cecelia Lovett	—	33⅓	5⅔%
Henry J. Blood, Jr.	—	33 ⅓	5⅔%
Oppenheimer & Co.	—	100	16⅔%
John Bretl	Director	—	—

Each share of Channel 45 Inc. stock is entitled to one vote (Channel 45 Ex. 1).

28. Oppenheimer & Co. (Oppenheimer or OpCo), a New York partnership, in addition to being a stockholder in the general partner, is the initial limited partner. The Partnership Agreement provides that except as provided by Ohio law, the limited partner shall not take any part whatever in the control, management, direction or operation of the affairs of the partnership and shall have no power to act for or bind the partnership. The general partner may from time to time seek suggestions and expressions of opinion from

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[3] Holtz lives in Pittsburgh, Pennsylvania; Grigsby lives in New York, New York and Tolbert lives in Virginia Beach, Virginia (Tr. 146, 203, 224).

the other partners on major policy decisions (and has done so here (Tr. 777–778)) but it need not accept such advice and at all times the sole control and management of the partnership shall rest with the general partner (Channel 45 Ex. 1; Tr. 777–778; 783–784).

29. Oppenheimer & Co., subject to the approval of the general partner, has the right to substitute new limited partners for all or part of its limited partnership interest. However, under no circumstances will any limited partner be admitted into the partnership who does not meet the Commission's rules on citizenship and multiple ownership. *Id.*

30. Michael Finkelstein, principal of and counsel for the applicant, was responsible for bringing the parties together (Tr. 793). Mr. Finkelstein, who had worked with Oppenheimer & Co. previously, brought in that group to provide financing to the applicant (Tr. 800). Messrs. Adrian, Harper and Finkelstein each initially contributed $5,000 to the preparation and prosecution of the application (Tr. 342). OpCo has paid the remainder of litigation expenses, an amount totalling $65,000 thus far (Tr. 342). OpCo will provide additional funds for the prosecution of the application as necessary (Tr. 343). There is no repayment obligation on the part of Channel 45 Company for funds thus far advanced. They are looked at as an investment by OpCo (Tr. 338–339). OpCo has also promised to guarantee $4 million worth of limited partnership interests. If such interests are not sold to investors, OpCo will buy them (Tr. 126).

31. OpCo was originally expected to be only a limited partner. However, when it was decided that OpCo would sell limited partnership interests to its customers, OpCo acquired a 16 ⅔% stock interest in the general partner. This equity interest in the general partner was acquired to provide security to outside investors and to enhance the prospects of raising money through the sale of limited partnership interests (Tr. 340, 345, 807–808). OpCo felt that a management position in the venture was important (Tr. 772, 778). Because potential investors cannot protect themselves, OpCo felt it should be in a management position to look after their interests (Tr. 777). Mr. Bretl, a director of Channel 45 Company is a member of the corporate finance department as well as a special limited partner of OpCo (Tr. 747).

32. When OpCo takes an equity position in a corporation, it typically maintains regular contact with corporate management (Tr. 750, 754, 756). In another television station in which OpCo has an involvement similar to its investment in Channel 45 Company, OpCo maintains regular contacts with management and was particularly involved in the early phases of the station start-up (Tr. 756).[4] In fact, Mr. Finkelstein, Chief Executive Officer of the Connecticut station, "practically lived there [at OpCo's offices]" (Tr. 811). Representatives

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[4] Such involvement relates to a Connecticut station.

of OpCo have visited the Connecticut station and met with management, and anticipate doing the same at Channel 45 Company (Tr. 757, 765).

33. Mr. Finkelstein has been primarily responsible for the prosecution of Channel 45 Company's application (Tr. 794). He keeps OpCo informed of developments in the proceeding (Tr. 761). During settlement negotiations in this proceeding and in preparation for trial, Mr. Finkelstein was on the phone "almost daily" to OpCo (Tr. 809–810). At the same time he gave only "periodic" reports to Messrs. Adrian and Harper. The other stockholders of the corporation attended one or maybe two meetings in Dayton, and were informed of what was happening by an "occasional" telephone call (Tr. 811).

Diversification

34. Oppenheimer & Co. owns 50% of the corporations which are the managing partners of various cable television systems, located in Maryland, West Virginia, Michigan, Alabama, Mississippi, Missouri, Tennessee and North Carolina. It owns no system in Ohio. In total, these cable systems pass more than 98,000 homes, serving approximately 66,000 subscribers (Channel 45 Ex. 5).

35. Richard Adrian is President, Treasurer and the sole shareholder of East Shore Broadcasting Corp., licensee of WRCN (AM and FM), Riverhead, New York (Channel 45 Ex. 5, p. 4). He plans to retain these positions even if the Channel 45 Company application is granted (Tr. 319). Michael Finkelstein is Secretary and a Director of East Shore Broadcasting Corp. (Channel 45 Ex. 5, p. 4).

36. Oppenheimer & Co. owns 42.5% of the voting stock of Channel 20, Inc., the general partner of Channel 20 Enterprises Limited Partnership, licensee of WTXX, Waterbury, Connecticut. John Bretl individually owns 3.75% of Channel 20, Inc.'s voting stock. Another employee of Oppenheimer and Co., Inc., a subsidiary of OpCo owns 3.75% of the voting stock. Esen Associates IX, a New York partnership, owns 50% of the voting stock of Channel 20, Inc. (Channel 45 Ex. 5, p. 4).

37. Oppenheimer & Co., as of the cut-off date in this proceeding owned the subsidiary Oppenheimer Holdings, Inc. (OPHI). OPHI in turn has certain subsidiaries among which is Oppenheimer & Co., Inc., which is a major stock brokerage firm listed with various stock exchanges including the New York Stock Exchange. Other subsidiaries of Oppenheimer & Co. manage assets of pension funds and operate mutual funds (Tr. 659–661; Joint Ex. 2).

38. Oppenheimer & Co., together with its subsidiaries, holds stock of numerous corporations which have mass media interests. This stock is held in its own name or in investment funds which it, or its subsidiaries, direct. Those corporations, with Oppenheimer's percentage interest, are as follows:

Avatar	.30
American Broadcasting Companies	.12
California Microwave	.09
Columbia Pictures	.20
Cox Broadcasting	.03
Disney	.38
General Cinema Corp.	.17
Gross Telecasting	.75
Gulf & Western	.12
Krueger Co.	.04
LIN	.20
Loews	1.50
M/A Com, Inc.	.12
MacMillan, Inc.	
Meredith Corp.	.45
Metromedia, Inc.	.01
Music Corp. of America	.09
National Screen Service	
Norton Simon, Inc.	6.70
Ogilvy & Mather Intl., Inc.	2.40
Orion Pictures	.34
Prentice Hall	4.90
RCA	.15
Reeves Comms. Corp.	.16
Rogers Cable System, Inc.	.06
Storer Broadcasting	.87
Telepictures Corp.	1.00
Telex Corp.	.10
Time, Inc.	.001
Times Mirror	.02
United Television, Inc.	.67
Videocorp of America	.30
Warner Comms., Inc.	.11
Westinghouse	.10

(Joint Ex. 2)

39. The specific media interests held by each of these corporations are listed in Appendix 1 attached. Appendix 1 consists of Joint Exhibit No. 3

Integration

40. Richard I. Adrian, owner of 33 ⅓ of the voting stock of Channel 45 Company, proposes to serve as the station's General Manager. Mr. Adrian will devote his full time (40 or more hours per week) and effort to that position. Mr. Adrian proposes to move to Dayton, Ohio upon a grant of the application of Channel 45 Company. He presently resides in New York with residences on Park Avenue and in East Hampton (Tr. 309, 316).

41. Richard I. Adrian was born in New York City on June 20, 1934. He was a Dean's list student at the Wharton School of the University of Pennsylvania and graduated with a B.S. degree in economics. Mr. Adrian then attended Harvard Business School and received his Masters Degree in Business Administration in 1960 (Channel 45 Ex. 2(A)).

42. Between 1960 and 1963, Mr. Adrian was employed by Dancer, Fitzgerald and Sample, first as an assistant account executive, and then as an account executive. In 1963, Mr. Adrian became an account executive with Gray Advertising Agency and was promoted to account supervisor. He left Gray Advertising Agency in 1969 to become vice president and account supervisor with Daniel and Charles Advertising Agency. In 1971, Mr. Adrian acquired a 50% interest in East Shore Broadcasting Corp., licensee of AM and FM stations WRCN located at Riverhead, New York. In 1977, Mr. Adrian became sole owner of the WRCN stations. *Id.*,

43. Mr. Adrian currently serves as a Director of the East End Arts and Humanities Council, Riverhead, New York. In 1977-78, he was co-chairman of the Eastern Suffolk United Way Fund Drive. From 1977 to 1980, Mr. Adrian served as a Director of the Riverhead County Fair. *Id.*

44. Mr. Adrian is currently the President, Treasurer and full time General Manager of WRCN-AM-FM, Riverhead, New York (Tr. 317). If Channel 45 Company is granted the construction permit, Mr. Adrian intends to continue to serve as President and Treasurer of WRCN (Tr. 318–319). Mr. Adrian has discussed his plans to become the General Manager of the proposed station in Dayton with the WRCN station manager, and has informed that person that the full management of WRCN will be turned over to him (Tr. 318). According to Mr. Adrian, there is a good second level of management under him and that the station is running very effectively in all areas including sales, programming, and engineering (Tr. 318). The station manager has been employed in that position for over five years and Mr. Adrian believes that "he is fully qualified to operate the station without [him]" (Tr. 318).

45. Ro Nita Hawes, owner of 5 ⅔% of the voting stock of Channel 45 Company, proposes to serve as the station's Promotion/Community Relations Director. Ms. Hawes will devote her full time (40 or more hours per week) and effort to that position. Ms. Hawes is a Black woman who resides in Dayton, Ohio.

46. Ro Nita Hawes was born on March 4, 1951, in Dayton, Ohio. After graduating from Roth High School in Dayton, Ms. Hawes attended Denison University in Granville, Ohio where, in 1973, she was awarded her Bachelor of Arts degree in theater, film and English. Ms. Hawes was awarded a fellowship upon graduation from college to attend Ohio State University, where in 1974, Ms. Hawes received her Master of Arts degree in communications (Channel 45 Ex. 2(C)).

47. In June 1974, Ms. Hawes became the Assistant Director of Community Services at WDTN-TV (Channel 2) in Dayton, Ohio. In July 1976, Ms. Hawes left her position with WDTN-TV to become an executive producer with University Regional Broadcasting, licensee of WPTD-TV in Dayton. In January 1979, Ms. Hawes was promoted

to Community Affairs Director at WPTD and she was also a producer/host. Ms. Hawes subsequently was promoted to the position of Director of Community Relations in July 1980. Ms. Hawes held that position until January 1982 when she assumed her present position as Director of News Services at the University of Dayton in Dayton, Ohio. Ms. Hawes was also the host and producer of a weekly three-hour call-in talk show aired by WDAO-FM in Dayton during the period May 1976 through May 1981. *Id.*

48. At the present time Ms. Hawes is President of the Dayton Chapter American Women in Radio and Television. She is also a member of the Board of Directors of the Campfire Council, a member of Black Women for Professional Development and a member of the Board of Directors of the Dayton Urban League. This year, Ms. Hawes will serve as co-chairman of the United Negro College Fund telethon. Ms. Hawes is also a member of the National Association of Real Estate Brokers as well as the Dayton Area Board of Realtors and the Junior League of Dayton. Ms. Hawes has also been a member of the Board of the Dayton Opera Association, a member of the National Association of Black Journalists and a member of the Board for Nontraditional Employment Programs at Wright State University. *Id.*

49. In 1981 Ms. Hawes was awarded the Kizzy Award given by the Black Women's Hall of Fam in Chicago, Illinois. Also in 1981, Ms. Hawes received the Obie Award given by the Ohio Educational Broadcasting Network of Columbus, Ohio, for her planning of a public relations campaign. In 1978, Ms. Hawes was named Outstanding Black Woman of the Year by the Alpha Phi Alpha fraternity at Wilberforce University in Wilberforce, Ohio. In 1976 through 1978, Ms. Hawes was a minority training recipient of the Corporation for Public Broadcasting in Washington, D.C.

50. Cecelia Lovett, owner of 5 ⅔% of the voting stock of Channel 45 Company proposes to serve as the station's Public Affairs Director. Ms. Lovett will devote her full time (40 or more hours per week) and effort to that position. Ms. Lovett is a Black woman who resides in Dayton, Ohio (Channel 45 Ex. 2(B)).

51. Cecelia Lovett was born in Greenville, Ohio, located approximately 40 miles north of Dayton, on February 28, 1943. Ms. Lovett graduated from Westmont High School in 1960 and has taken a number of workshops in writing and speech at Sinclair Community College and the University of Dayton (Channel 45 Ex. 2(B)). *Id.*

52. After working in Richmond, Indiana for several years after graduation from high school, Ms. Lovett moved to Dayton, Ohio in 1965. In 1972, Ms. Lovett was employed by Don Black and Associates in the field of public relations. Between 1973 and 1977, Ms. Lovett was employed by the University of Dayton and by the Metropolitan Life Insurance Company, both of which are located in the Dayton metropolitan area. In June 1977, Ms. Lovett joined Springfield

Television Corporation, WKEF (Channel 22), where she became Administrative Assistant to PM Magazine. In 1978, Ms. Lovett was promoted to the position of Assistant in Community Affairs and Assistant Public Service Director. In April 1982, Ms. Lovett was promoted to the position of Public Service Director of WKEF, the position she currently holds. As part of her responsibilities, Ms. Lovett produces several public affairs programs involving the Dayton community including "Dayton Today", "As Schools Match Wits", and the Big Brothers/Big Sisters annual auction. Ms. Lovett is also Associate Producer of the muscular dystrophy telethon. *Id.*

53. Ms. Lovett is a member of the Young Republicans West in Dayton, Ohio and is Coordinator of Coordinators for Neighbor Affairs Programs of the Dayton Police. Ms. Lovett is active in the Freedom Hill Baptist Church where she is a member of the choir and secretary of the TLH Club.

54. Henry J. Blood, Jr., owner of 5 ⅔% of the voting stock of Channel 45 Company, will serve as the station's Production Manager. Mr. Blood proposes to devote his full time (40 or more hours per week) and effort to that position. Mr. Blood is a Black man who resides in Springfield, Ohio, a city within the 80 dBu contour of the proposed station (Channel 45 Ex. 2(D)).

55. Henry J. Blood, Jr. was born in New York City on May 24, 1954 and attended Syracuse University in Syracuse, New York, where in 1976 he received his Bachelor of Science degree with a major concentration in radio and television and a minor concentration in psychology. Upon graduation in 1976, Mr. Blood became employed with Continental Cablevision Company in Springfield, Ohio. Mr. Blood began his employment as a playback operator and was eventually promoted to Assistant Director where he directed locally originated programming on location in three cities. In 1977, Mr. Blood left Continental Cablevision to join Springfield Television, licensee of WKEF, Channel 22 in Dayton, Ohio. Mr. Blood was hired as a Switcher/Director and has held the positions of Director of News Production, Daytime Commercial Director, Video Tape Editor and Still Photographer. He has since been promoted to Assistant Production Manager, a position which he currently holds. *Id.*

56. Mr. Blood has been active in the St. John's Missionary Baptist Church located in Springfield, Ohio. Since October 1981, he has served as a tutor in the church's tutoring program for high school and grade school children. Mr. Blood also serves as photographer for the church. *Id.*

57. David B. Harper, owner of 16 ⅔% of the voting common stock of Channel 45 Company, will serve as Channel 45 Company's Treasurer and as the station's comptroller. In those capacities, Mr. Harper will be the Chief Financial Officer of the corporation and the station and will be responsible for the organization and supervision

of all of the station's financial affairs, including budgeting, accounting and tax reporting (Channel 45 Ex. 2(E)).

58. Mr. Harper is also the Executive Vice President of the corporation and will serve as one of Channel 45 Company's four Directors. In his role as an Officer and Director of the corporation, Mr. Harper will actively participate in management of the station including selection of key personnel, programming and general oversight of station operations. *Id.*

59. Mr. Harper is a Black man and will devote a minimum of 10 hours per week to these responsibilities. *Id.*

Financial Issue

60. Channel 45 Company estimates that it will require $2,161,000 to construct its proposed facility and operate it for three months. To meet those expenses, Channel 45 Company relies upon a $4 million line of credit extended by the Manufacturers Hanover Trust Company to Oppenheimer & Co. The bank commitment letter specifically earmarks those funds for the purchase of limited partnership units in Channel 45 Company (Channel 45 Ex. 6(A)).

61. In a separate commitment letter to Channel 45 Company, Oppenheimer & Co. agreed that, upon a grant of Channel 45 Company's application, it would use its best efforts to arrange for a private placement of limited partnership interests which would provide Channel 45 Company with the capital required to build and operate its proposed television station. The letter indicated that an offering of $4 million was contemplated and that, in the event any limited partnership interests so proffered are not acquired, Oppenheimer & Co. would purchase such interests subject to its review of economic and other conditions at the time of the offering (Channel 45 Ex. 6, p. 1).

Security & Exchange Commission Issue

62. Oppenheimer & Co. (OpCo or the Partnership) is a New York limited partnership with 27 general and more than 50 limited partners (Channel 45 Ex. 7). The affairs of the Partnership are managed by an executive committee, whose members are Leon Levy, Jack Nash, Donald W. Spiro, Stephen Robert and Nathan Gantcher (Tr. 637). Through a wholly-owned subsidiary, Oppenheimer Holdings, Inc., the Partnership is either a passive investor or an active participant in a wide range of businesses (Channel 45 Ex. 7; Tr. 637). The Partnership business interests include the cable television systems and station WTXX-TV discussed above. *Id.*

63. Until 1974, the Partnership engaged in the securities business providing customers throughout the country services as a broker in securities and options and a dealer in corporate, government and municipal securities. In 1974, the Partnership's securities business was transferred to Oppenheimer & Co., Inc. During the

times relevant to this proceeding, the Partnership, through a subsidiary, owned 100% of the common stock of Oppenheimer & Co., Inc. and had ultimate control of its operations (Channel 45 Ex. 7, at 2).[5]

64. Oppenheimer & Co., Inc. employs more than 1,000 persons in offices in New York City, Los Angeles, Chicago, Houston, Ft. Lauderdale, Miami and London. Approximately 340 of its employees are Account Executives who buy and sell securities for their customers. The Oppenheimer & Co., Inc. Executive Officers are:

Jack Nash, Chairman of the Board and
  Chief, Executive Officer
Stephen Robert, President and
  Chief, Operating Officer
Nathan Gantcher, Executive Vice President
Ludwig Bravmann, Vice President
Albert D. Fortinsky, Vice President
  and Chief, Financial Officer

Messrs. Nash, Robert and Gantcher are also Directors of Oppenheimer & Co., Inc. along with Leon Levy, Ludwig Bravmann, Charles H. Brunie, Michael Craig Stoddart, and two outside Directors, Richard Ramsden and Burton Hallowell. *Id.*

65. The partners who were principally responsible for the Partnership's decisions regarding the acquisition of station WTXX-TV and participation in the Channel 45 Company application are Leon Levy, Jack Nash and John Bretl. Other partners are aware of these matters and are from time to time consulted concerning them, but have delegated authority in the matters to Messrs. Levy and Nash (Channel 45 Ex. 7, at 3).

66. No current general partner of Oppenheimer & Co. was personally involved in any of the events which gave rise to the SEC proceedings involving Oppenheimer & Co., Inc., except Thomas O'Donnell, the manager of the Oppenheimer & Co., Inc. Chicago office. Branch managers are ordinarily former salespersons elevated to their positions primarily because of their ability to hire, supervise, and motivate other salespersons. Branch managers, including Mr. O'Donnell, do not participate in the Partnership's other business activities.

67. On January 8, 1980, the Securities and Exchange Commission (SEC) issued, *inter alia*, "Findings and Order Imposing Remedial Sanctions" (Order) *In the Matter of Oppenheimer & Co., Inc., Ronald L. Brownlow, Daniel J. Piet, Warren K. Hayes, Charles W. Wright, Robert Hunziker and Thomas J. O'Donnell.* For the purpose of settling this proceeding and without admitting or denying the

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[5] At the time of the hearing, a contract had been entered into between Oppenheimer & Co. and United Kingdom Enterprise for the sale of the subsidiary mentioned, Oppenheimer Holdings, Inc., which owned Oppenheimer & Co., Inc. (Tr. 119; 133).

allegations contained in the Public Proceedings, Oppenheimer agreed to accept an "Offer of Settlement" in which it consented to findings of violations and sanctions imposed by the Order. The consent decree involved a violation of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10(b) (5) of the Securities and Exchange Act of 1934. In this particular case, several sales representatives of Oppenheimer's Chicago office were charged with having misled some of their customers concerning the nature and risks of the options market. Thomas O'Donnell, the sales manager, and Oppenheimer were charged with failure to supervise the four sales representatives. The actions forming the basis of the SEC's consent decree took place in 1977-78 (DTI Ex. 4). Customers lost approximately $2 million (Tr. 715). The SEC censured Oppenheimer and the company agreed to make restitution in the amount of $175,000 (DTI Ex. 4).

68. The bond options program was originally brought to OpCo by Thomas O'Donnell from Merrill, Lynch. Mr. O'Donnell brought several Account Executives to Opco who were familiar with the bond options program from Merrill, Lynch. OpCo management relied to some extent on the fact that the program had been developed at Merrill, Lynch, and concluded that the program was a conservative one.

69. The bond options program made money at first. But Mr. Brody, the head of the options department, was concerned that the bond options program presented higher risks than other managed options programs, and had a study done around the beginning of 1977 which confirmed his concerns. He communicated his concerns to others in the New York office. He also communicated his concerns to Mr. O'Donnell, and to the Account Executives in the Chicago office, but his advice to hedge the program met with resistance from the Chicago office.

70. When OpCo learned that its Chicago bond options customers were incurring losses, the level of its concern increased. In the spring or summer of 1977, Mr. Bravmann, the Director of Compliance for OpCo, suggested to Mr. O'Donnell that he look for investments other than bond options, and Mr. O'Donnell said that he would do so. Then, after counsel prepared a memo on September 20, 1977, indicating that the Chicago office was not reviewing its customers sufficiently to determine their suitability for options trading, Mr. Bravmann ordered Mr. O'Donnell to spend more time in compliance efforts. At the end of 1977, Mr. Bravmann told Mr. O'Donnell to wind down any bond options still in existence. By March of 1979, the bond options program was no longer in use in Chicago; to Mr. Bravmann's knowledge it had never been in use in any other offices of OpCo. *Id.* at 11-12.

71. In another proceeding against Oppenheimer, entitled *In the Matter of Oppenheimer & Co., Inc.* (SEC File No. 3–5244), an SEC

Administrative Law Judge in an Initial Decision dated January 3, 1979, censured Oppenheimer for violating Section 13(d) of the Securities and Exchange Act of 1934 and Rule 13(d)-1 thereunder because Oppenheimer failed to file with the Commission required reports concerning the acquisition of 5% of the corporation's stock (DTI Ex. 5). Rule 13(d) is utilized to give notice as to a concentration of control (Tr. 671). The facts relating to this violation are as follows: On May 17, 1974, OpCo acquired a block of 125,000 shares of Medcom Inc. for a total of $343,750. The stock was purchased from Keystone Custodian Fund (Keystone), a customer of OpCo. OpCo had attempted to find a buyer for the stock for about a week prior to purchasing it, and continued to try to find a buyer after purchasing it. As it then attempted to "make a market" for the Medcom shares and sell them without causing market disruptions, OpCo continued to buy and sell Medcom shares through March of 1975. *Id.* at 6–7.

72. The size of the block of stock initially acquired was not particularly notable for OpCo, either in dollar amount or in number of shares. In the three months prior to May 17, 1974, its block transactions for Keystone (which was not one of its largest institutional customers) included three in the million dollar category and involved blocks of up to 186,000 shares. Yet none of these block transactions had necessitated the filing of a 13D statement inasmuch as they did not constitute 5% of the issuer's equity securities. Moreover, the Keystone representative who negotiated this particular sale made no mention that the block constituted 5.8% of Medcom's stock, even though Keystone had theretofore filed a 13D statement. *Id.* at 7.

73. The problem was compounded by the fact that the OpCo Trading Department had completed a change-over of supervisory personnel prior to the purchase of the Medcom stock. The departing supervisor had failed to turn over to his successor, Charles Howley, an interoffice memorandum which earlier had been distributed to supervisory personnel calling attention to the fact that Section 13(d) of the Exchange Act had been amended to reduce from 10% to 5% the size of the holding which required the filing of the 13D statement. Thus, no 13D statement was filed within 10 days of the stock purchase, as it should have been. *Id.* at 8.

74. At one point, in approximately October of 1974, Opco's holdings began to approach 10% of Medcom's stock. When this occurred, counsel for OpCo was notified that it had exceeded the 5% filing requirement. Due to a misunderstanding understanding between counsel and Bernard Garil, the official of OpCo who had notified him, a 13D statement again was not filed. Finally, a 13D statement was filed after notification from the SEC (to which Medcom had reported the sale) that a 13D statement was overdue. The filing was made five months after OpCo officials became aware of the violation (Tr. 675).

75. Another SEC order, released July 19, 1977, found that Oppenheimer and others had willfully violated and willfully aided and abetted violation of Section 17(a) of the Securities Act of 1933, Section 10(b) and Rule 10(b)(5) of the Securities Exchange Act of 1934, and Section 17(a) and Rule 17(a)(3) of the Securities and Exchange Act of 1934. The facts relating to this matter are as follows: One William H. Langfield II (Langfield) was employed as a stock trader by Investors Diversified Services, Inc. (IDS). While trading directly with other broker-dealers on behalf of large institutional customers of IDS, he was also trading directly with these broker-dealers for his own personal account. He instructed these broker-dealers to confirm his personal transactions with his personal broker (usually Heine, Fishbein & Co., Inc.) and all these broker-dealers ended up recording Langfield's personal transactions as transactions with Langfield's broker (Channel 45 Ex. 7 at 4).

76. Langfield was able to obtain favorable deals for his personal account by misusing his position as a trader for IDS's institutional clients. The SEC barred him from associating with any broker-dealers or investment advisers. The SEC charged OpCo, along with most of the twelve other brokerdealers, with failing to record accurately its transaction with Langfield, thus harming IDS's institutional customers (Channel 45 Ex. 7 at 4-5). For its participation in this activity, Oppenheimer was censured and, in lieu of a 20-day suspension from trading, it agreed to pay $40,000 to the appropriate companies for whom the individual was to be acting, and to whom reports of his private investments should have been furnished. OpCo also revised its recording procedures to ensure that in the future such personal transactions were recorded in the individual's name and not in his broker's name. *Id.* at 5–6.

77. Of the nineteen individuals charged in the proceedings, two were OpCo general partners. One, William Weinstein, was censured (as was OpCo itself). The other, Charles Howley, the Trading Department manager, was censured and suspended from trading for twenty days. Neither one has been a general partner of OpCo since at least July 31, 1980.

Sinder Broadcasting of Ohio, Inc.

Composition of Applicant

78. Sinder Broadcasting of Ohio, Inc. is an Ohio corporation and consists of the following officers, directors and stock subscribers:

Alfred M. Sinder	– President, Treasurer, Chairman of the Board and 83.98% stock subscriber
Altagracia Ramos	– President, Director and 1.78% stock subscriber

Lawrence Brown	– Vice President, Director and 1.78% stock subscriber
Frederick Sinder	– Secretary, 1.78% stock subscriber
Robert Meyer	– 1.78% stock subscriber
Gerald Francis	– 1.78% stock subscriber
Larry McGregor	– 1.78% stock subscriber
Jack Ames	– 1.78% stock subscriber
Bernard Kirley	– 1.78% stock subscriber
Robert Keelor	– 1.78% stock subscriber

(Sinder Ex. 1)

79. Mr. Kirley and Mr. Keelor, while both are stock subscribers, are no longer expected to be associated with the applicant. Ms. Ramos and Mr. Brown each hold options which, if exercised, would give them the right to acquire up to 643 shares of stock of Mr. Sinder. These options can be to acquire up to 643 shares of stock of Mr. Sinder. These options can be exercised for up to three years from the date of grant of a construction permit. Upon exercise, Mr. Sinder's ownership would be reduced to 77.5% (Sinder Ex. 1).

Diversification

80. Neither Sinder nor any of its principals has any present interest in a medium of mass communications (Sinder Ex. 2). However, Daycom Corporation (Daycom), of which Mr. and Mrs. Sinder own 60% of the stock, is presently an applicant for MDS stations in Indianapolis and Pittsburgh (Sinder Ex. 3, p. 3).

Integration

81. Sinder proposes that if it is granted a construction permit to operate a television station in Dayton, Alfred Sinder will be integrated into the management of the station as its full-time (a minimum of 40 hours per week) General Manager (Sinder Ex. 3 at 3). Mr. Sinder will resign from his post as President of Daycom in order to head Sinder Broadcasting on a full-time basis. *Id.*

82. Mr. Sinder is currently President and a Director of Daycom (Tr. 364–365) and owns approximately 30% of the stock (Tr. 365). His wife owns approximately 30% and his two sons and daughter own between 3% and 5% (Tr. 365). In effect, Mr. Sinder's immediate family owns greater than 60% of the stock of Daycom, and Mr. Sinder therefore controls the corporation (Tr. 365–366).

83. Alfred M. Sinder was born in New York City and grew up in Brooklyn, New York. The Army Air Corp sent Mr. Sinder to Union college where he completed a course of study in electrical engineering (Sinder Ex. 3 at 1). After leaving the Army, Mr. Sinder worked in

the management of Station WING, owned by Great Trails Broadcasting Corp. *Id.* While at WING, during the 1950's, Mr. Sinder became part owner of Dayton Wired Music Service, which later became Dayton Communications Corp. (now Daycom Corporation). *Id.* (Tr. 366). In 1956, Mr. Sinder became the sole shareholder of the company, as well as its President and one of the company's three Directors. (Tr. 368).

84. Daycom's business interests expanded during the period from 1956 through 1974. In 1972, a portion of Daycom's common stock was sold to the public (Tr. 381). Daycom is now divided into two divisions—telephone interconnect and flight information display (Tr. 396). Its annual sales were approximately $5.4 million in 1981 (Tr. 404) and are expected to be slightly less than $4 million in 1982 (Tr. 598).

85. Alfred Sinder participates actively in the day-to-day operation of Daycom (Tr. 492). He approves the purchase of capital equipment (Tr. 416; 431–432); reviews expenditures over $20,000 (Tr. 418; 473); monitors expenditures relative to the company's anticipations (Tr. 474); approves allocations for development projects (Tr. 411–412); reviews and discusses proposed contracts (Tr. 427–428; 492; 489); receives weekly reports of Daycom sales contracts; and "know[s] of every proposal that comes out of the building" (Tr. 489). Mr. Sinder's responsibilities also include purchasing office equipment (he personally selected the company's word processing system) (Tr. 459–460); monitoring company salaries (Tr. 429–430); handling inquiries from shareholders (Tr. 444) and meeting with the company's auditors (Tr. 444–445). While Mr. Sinder delegates many functions to division managers and gives them wide latitude in running their divisions, he makes most decisions that can be characterized as major, particularly of a financial nature (Tr. 830; 430; 472–473). The amount of time Mr. Sinder spends each day on Daycom business varies (Tr. 493–497).

86. Mr. Sinder, at the suggestion of the DAYCOM Board of Directors, has been conducting a search for professional management to run DAYCOM after he steps down (Tr. 506, 942). He has had concrete discussions with several people regarding the possible succession to his position at DAYCOM (Tr. 948). According to Mr. Sinder, the name of his successor was to be announced at the September 2, 1982 meeting of the DAYCOM Board (Tr. 962). Mr. Sinder is prepared to step down from his position at DAYCOM when his successor is installed and trained (Tr. 963). In any event, Mr. Sinder plans to resign the presidency of DAYCOM when the television station is granted to Sinder (Tr. 497). DAYCOM's Board has been informally advised of Mr. Sinder's plans and, indeed, all members of the Board have been provided with a copy of the Sinder application which listed Mr. Sinder as proposed full-time General Manager (Tr. 497–498, 505–506, 512–513). Moreover, Mr. Sinder's

plans to give over the management of DAYCOM to a professional successor were announced on November 16, 1981 at the annual meeting of DAYCOM's employees, bankers, Board and other invited guests (Tr. 501–502). Mr. Sinder plans to retain his position as Chairman of the Board at DAYCOM (Tr. 500).

87. Mr. Sinder has lived in the Dayton area since 1940. He is married, the father of three children, and active in his local Temple, Sinclair Community College, and the United Way (Sinder Ex. 3; Tr. 492).

88. Mr. Sinder will serve as full-time General Manager of the station. He will be present at the station overseeing and directing all departments (Sinder Ex. 3; Tr. 98). He has always wanted to run his own TV station (Tr. 597–598, 888). This station is his dream (Tr. 598).

89. Altagracia Ramos, a 1.78% stockholder, is Vice President of Sinder and will be the full-time Community Relations Director. Ms. Ramos, who has resided in Dayton since 1966, is a Hispanic-American and proposes to coordinate the station's community activities, its support of charities and other civic organizations. She also proposes to produce special reports and develop programs on community problems and other concerns (Sinder Ex. 4 at 4).

90. Ms. Ramos is a member of various community and national organizatons serving some in leadership capacities. These include, *inter alia*, Treasurer of the Dayton Area Baptist Women and Chairman for social relations for at least two years; Secretary/Treasurer from 1974 to 1975 of Mexico Club; past Vice President of the IMAGE of Dayton Organization (Organization concerned with the employment of Hispanics) and a member of National IMAGE, Inc.; Secretary of the Green Valley Recreation Club Board of Directors; Green County United Way Headstart Representative. *Id.* at 1–3. Ms. Ramos has been awarded a citation by the Air Force Association for Community Services. *Id.*

91. Mr. Lawrence Brown, a 1.78% stockholder is proposed to work full time as the Sales Manager of the station. Mr. Brown has been involved in sales and marketing since 1966 and has most recently been involved in telephone systems marketing for Daycom (Sinder Ex. 5). Mr. Brown is a Black American who has served from time to time as the basketball and soccer coach for Yellow Springs High School and community leagues and as a little league umpire. He was elected "outstanding soccer coach" by the students. He has also served on several village and school district committees helping to lay out the future goals of the village and schools. Mr. Brown resides in Yellow Springs, Ohio, a suburb of Dayton (Sinder Ex. 5).

Ultimate Findings and Conclusions

92. This proceeding involves the mutually exclusive applications of Dayton Telecasting, Inc. (DTI), Channel 45, Inc. & Oppenheimer & Co. d/b/a Channel 45 Company (Channel 45 Company) and Sinder

Broadcasting of Ohio, Inc. (Sinder) for a new television station in Dayton, Ohio. In addition to the standard comparative issue,[6] a basic qualifying issue relating to the financial qualifications of Channel 45 Company is outstanding. Because only basically qualified applicants are entitled to comparative consideration,[7] the basic issue directed against Channel 45 Company will first be considered and resolved.

Financial Issue

93. The Commission's financial qualifications standard requires that applicants for new television stations demonstrate the availability of sufficient capital to construct the station and operate the facility for three months, without relying upon advertising and other broadcast revenue. *Financial Qualifications Standards,* 72 FCC 2d 784 (1979). Channel 45 Company will require $2,161,000 to construct and operate the proposed television station. To meet those projected expenses, Channel 45 Company relies upon a $4 million line of credit extended by the Manufacturers Hanover Trust Company to Oppenheimer and Co., which specifically earmarks those funds for the purchase of limited partnership units in Channel 45 Company. Oppenheimer & Co. has committed itself to arrange for a private placement of those limited partnership interests in the amount of $4 million and to purchase any interests which are not acquired pursuant to the placement offering. It thus appears that the necessary financing will be obtained from a private placement of limited partnership interests or from Oppenheimer & Co. itself purchasing such interests. In either case, the applicant has established reasonable assurance of the availability of sufficient funds to build and operate the station. In this connection, in *Contemporary Television Broadcasting, Inc.* (BC Docket No. 80–768), BC 5812, released January 16, 1981, the Chief, Broadcast Bureau, stated that "henceforth, bank commitment letters directed to investors in an applicant, which earmark funds for that purpose, will be accepted as part of an applicant's proposed source of funds".

94. DTI and Sinder both argue that serious problems exist regarding the funding of Channel 45 Company and that the applicant is not financially qualified. More specifically, it is argued that the money from the bank loan will not be available to the applicant. First, the bank can re-evaluate the financial condition and business operation of OpCo at the time the loan is needed. Moreover, the bank proposes to lend money to Oppenheimer & Co. for the purchase of limited partnership shares and whether or not Oppenheimer & Co. will take down the loan and invest is solely within its

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[6] The comparative issue also includes consideration of SEC violations involving Oppenheimer & Co.

[7] *Louis Adelman,* 29 FCC 1223 (1960), *Affirmed sub nom. Guinan* v. *Federal Communications Commission,* 297 F.2d 782 (1961).

discretion. Because such decision is conditioned upon a review of economic and market conditions at the time of funding, and because of the uncertainty of the bank loan being available, DTI and Sinder argue that reasonable assurance of Channel 45 Company's financial qualifications has not been established.

95. It is well established that the Commission does not require a broadcast applicant to have a contractually binding bank loan commitment, but merely a reasonable assurance of the availability of the loan. *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1088, 47 RR 2d 1265, 1271 (1980). "A bank loan commitment letter, by itself, is sufficient to establish the availability of a bank loan absent a showing which questions the validity of the letter or the bank's ability to make the loan". *New Continental Broadcasting, Inc.*, 88 FCC 2d 830, 836; 50 RR 2d 1117, 1123 (1981). The inclusion of language in the commitment letter that the bank will base its final decision on conditions existing at the time the grant is actually made, is merely "a common business practice" and does not negate the assurance of the availability of the loan. *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 708 (1982). Similarly, OpCo's willingness to provide financing to Channel 45 Company is not diminished by its statement that it too reserves the right to re-evaluate its commitment in the light of subsequent changes in economic conditions. The language merely reflects common business practice.

96. Channel 45 Company has established reasonable assurance of the availability of the bank loan and that sufficient funds will be available to the applicant to build and operate the station. Thus, Channel 45 Company is financially qualified and DTI's and Sinder's arguments to the contrary are rejected.

Comparative Issue

97. The evaluation of mutually exclusive applicants under the comparative issue is governed by the Commission's *1965 Policy Statement On Comparative Broadcast Hearings (Policy Statement)*, 1 FCC 2d 393 (1965). In its Statement, the Commission indicated that there are two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.

Diversification

98. There is no dispute that Sinder, as the only party in this proceeding without any attributable media interests, receives a preference under the diversification criteria. There is a dispute, however, regarding the extent of the preference to which Sinder is entitled. Sinder argues that such preference is "substantial" whereas both DTI and Channel 45 Company argue that the preference is only "slight".

99. In evaluating the significance of media interests under diversification, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. *Policy Statement* at 395. Other important factors to weigh are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas. The *Policy Statement* also indicated that control of large interests elsewhere in the state or region may outweigh control of a small medium of expression (such as a weekly newspaper) in the same community. The media interests of DTI and Channel 45 Company must be evaluated with the above principles in mind.

DTI

100. Individuals holding 70% of DTI stock are licensees of a UHF television station in Charleston, West Virginia. Charleston is some 175 miles from Dayton. Sinder would attribute other media interests to DTI.[8] However, DTI argues that the option does not constitute a media interest cognizable under the diversification criteria. But, in *Radio Laredo*, 87 FCC 2d 353 (1981), footnote 14, the media interests of an individual who held an option to acquire an interest in the applicant was held against the applicant. Contrary to the arguments of Sinder, principals of DTI are not the permittee of a TV station in Wichita, Kansas. Such grant was reversed by the Review Board[9] and, while an application for review is pending, at this time this media interest cannot be attributed to DTI. Similarly, Sinder's argument that DTI should be saddled with David Grigsby's 30% interest in a Richmond, Virginia radio station is rejected. Grigsby, a 20% stockholder in DTI, stated his intention to divest himself of this interest prior to the "B" cut-off date. Specifically, it was stated that "Mr. Grigsby expects to divest this interest in the near future. Negotiations toward this end are underway". In fact, Grigsby disposed of his interest prior to hearing. It is Sinder's position that Grigsby's statement that he "expects" to dispose of his interest was not "unequivocal" and "absolute" within the meaning of *WHW Enterprises, Inc.*, 89 FCC 2d 799 (1982) and *Alexander S. Klien, Jr.*, 69 FCC 2d 2134 (1978). The Presiding Judge is of the view that the divestiture statement of Grigsby, prior to the cut-off date, should be credited. Such statement was firm and unequivocal. The word "expects" used by Grigsby refers to the fact that the divestiture would take place in the "near future", not that he merely expected to dispose of his interest. Thus, Grigsby's promise to divest coupled with

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[8] The only other media interest attributable to DTI is an option to acquire a 12½% interest in a recently awarded UHF station in Portland, Maine.

[9] See *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (1982).

the actual divestiture will be credited and his 30% interest in the Richmond, Virginia station will not be attributed to DTI under the diversification criteria. In summary, DTI has the Charleston, West Virginia UHF station and the option to acquire a 12½% interest in a Portland, Maine UHF permittee.

Channel 45 Company

101. The significance of the media interests held by individuals and entities which comprise Channel 45 Company is disputed by the parties. DTI and Sinder argue that those interests are substantial while Channel 45 Company asserts that such interests are insignificant and that the media holdings of Channel 45 Company and DTI are brought to "decisional equipoise".

102. When considered under the principles enunciated in the *Policy Statement*, the media holdings of Channel 45 Company are not such that they result in an overwhelming comparative demerit in this proceeding notwithstanding that those attributable media interests are extensive. *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (1982). Nevertheless, such interests are not insignificant, but rather sufficient to place Channel 45 Company behind the other two applicants under the diversification criteria.

103. OpCo owns 42.5% of the stock of the general partner of a television station in Waterbury, Connecticut. A partner of OpCo owns 3.75% and another OpCo employee owns 3.75% of the stock. A partner of OpCo is a Director of the general partner of that station. The remaining 50% of the Waterbury television station is owned by Esen Associates IX, a partnership. Michael Finkelstein, principal of the applicant here owns 50% of the equity of that partnership and votes all the stock the partnership owns in the Waterbury licensee. In addition, OpCo has cable interests that serve in excess of 64,890 subscribers. Moreover, OpCo, through its ownership of a stock brokerage company also owns for its own account and the account of others, stock in publicly held broadcast companies and various mutual funds which also own broadcast stock. These stock interests range from .01% to 6.70%, and, while in most instances they are too small to be considered significant, such interests cannot be totally ignored. *Cleveland Broadcasting, Inc.*, 7 FCC 2d 680 (1967). Finally, the proposed General Manager of the Dayton station and a 33 ⅓% stockholder in the general partner of the applicant owns two broadcast stations in Riverhead, New York and will continue to act as General Manager of these stations, a further factor to be considered under the diversification criteria. *Guy S. Erway*, 48 RR 2d 829, 831, n. 6 (1980); *Policy Statement*, 1 FCC 2d at 394 n. 5. The cumulative impact of all these attributable media interests are greater under the *Policy Statement* than the 100% interest 70% of DTI principals have in the Charleston UHF station. Such station is not so close to Dayton, nor is its significance under the *Policy*

Statement so great as to render DTI's media interests equal to the more numerous and extensive interests attributable to Channel 45 Company. Stated simply, in ranking the applicants under diversification, Sinder receives a preference, DTI is next, and Channel 45 Company is last. Sinder, because it has no attributable media interests, enjoys a clear, but moderate preference over DTI. *Billy D. Pirtle*, 43 FCC 2d 670 (1973).[10]

Integration

104. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement On Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated". *Policy Statement*, *supra* at 395. Full-time, or almost full-time participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experience and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

DTI

105. Three of DTI's shareholders will be integrated into day-to-

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[10] Some of the cases relied upon by Sinder in support of its argument for a greater diversification preference are off target. In *KBBS, Inc.*, 52 RR 2d 185 (1982), the applicants involved an existing licensee in a community contesting with an applicant with no media interests, hardly the situation here. Also, in *Town and Country Radio, Inc.*, 44 RR 2d 151 (1977), the 100% owner of the applicant owned seven stations within 200 miles of the community for which the applications were filed. Moreover, DTI's reliance on *Minneapolis Star & Tribune*, 88 FCC 2d 1604 (1982) and *Gilbert Group, Inc.*, 88 FCC 2d 401 (1982) to minimize Sinder's preference, is misplaced. *Minneapolis Star & Tribune* involved an applicant seeking to improve its facilities. *Gilbert Group, Inc.*, involved applicants with extensive media interests. Here, Sinder has no attributable media interests whatever and in *Billy D. Pirtle*, cited *supra*, a similar factual situation gave rise to a preference characterized by the Review Board as "substantial". On the basis of *Billy D. Pirtle* Sinder argues that the preference should be characterized as "substantial". The Presiding Judge is hesitant to award a "substantial" preference here because the Charleston-Huntington television market, where DTI's main attributable media interest is located, has a multiplicity of service including three VHF stations, five AM and five FM stations. The option to acquire a 12½% interest in the Portland permittee by DTI does not significantly alter Sinder's preference.

day management on a full-time basis. Mr. Holtz, a 21% shareholder will work full time at the station as General Manager. David Grigsby, a 20% shareholder, will serve as Station Manager of the proposed station. Samuel Tolbert, a 10% shareholder, will serve as Vice President-Engineering. His duties will also include supervision and direction of minority-oriented programming. Thus, shareholders owning 51% of DTI will serve full time in management level positions at the proposed station.

106. DTI's integration proposal is enhanced because Grigsby and Tolbert are Black Americans who have significant past broadcast experience and each intends to relocate to Dayton in the event the DTI application is granted. Moreover, Holtz, a 21% stockholder, has more than fifteen years of television experience and also intends to move to Dayton in the event of a grant.

107. Sinder questions Grigsby's shareholder status and integration proposal because he has not contributed any funds and has not advised his employer of his plans to move to Dayton. However, there was no reason for Grigsby to have advised his employer of his plans to move to Dayton. Such move may never take place and it would have been imprudent for Grigsby to have jeopardized his present employment by a premature disclosure of his plans. Moreover, Grigsby did sign promissory notes which obligates him to pay his pro-rata share in DTI's venture.[11]

108. Sinder also argues that Grigsby will replace Holtz as General Manager of the proposed station and then move on to work at other stations owned by DTI principals. There is no factual support for this argument. Holtz has emphasized that his primary commitment is to the Dayton station and he will not allow any other project to interfere with his commitment to the Dayton station. Sinder's arguments to the contrary are based solely on speculation and they are rejected.

109. Sinder also attacks the integration proposal of Tolbert. According to Sinder, Tolbert will retain significant executive responsibilities at SST Enterprises, his wholly owned communications consulting company, and his personal involvement therein will prevent him from fulfilling his full-time integration proposal. However, Tolbert explained that SST Enterprises will be managed by an individual who is presently the Operations Manager and other staff personnel already in place. Moreover, while Tolbert has in the past been personally involved in some of SST Enterprises work, such personal involvement occurred at a time when SST Enterprises was a young company attempting to enhance its business reputation. For this reason, Tolbert personally undertook the Brazil project, which

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[11] The Commission has previously credited minority ownership and integration even where the stock was acquired by gift. *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981).

consisted of the designing of a six station television network in Brazil involving the expenditure of approximately $2 million. This was a unique situation and any future contracts would be negotiated in such a way as not to require Tolbert's services if they conflict with his commitment to the Dayton station. Tolbert has adequately explained how his commitment to the Dayton station can be reconciled with his responsibilities to SST Enterprises. Such sworn commitment cannot be brushed aside on the basis of the speculative arguments advanced by Sinder. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (1982).[12]

Channel 45 Company

110. Channel 45 Company is a partnership with a corporate general partner and a limited partner. Because its limited partner has no voice in the management or operation of the affairs of the partnership, only the ownership of the general partner is considered for purposes of integration of ownership and management. *Anax Broadcasting*, 87 FCC 2d 483 (1981).

111. The general partner of Channel 45 Company is Channel 45, Inc. The following stockholders will be integrated full-time: Richard Adrian, a 33⅓% stockholder as General Manager; Ro Nita Hawes, a 5⅔% stockholder as Promotion/Community Relations Director; and Cecelia Lovett, a 5⅔% stockholder as Public Affairs Director; Henry Blood, Jr., a 5⅔% stockholder as Production Manager. Such integration proposal is enhanced because Adrian, Lovett, Hawes and Blood have past broadcast experience, and Lovett and Hawes are Black American women who are Dayton residents with significant civic activities in leadership capacities. Blood is also a Black American who resides within the proposed station's service contour. In addition to the foregoing, David Harper, a Black American and a 16⅔% stockholder in the general partner, proposes to devote 10 hours a week to the station and such proposal is entitled to merit. *Midwest Broadcasting Company*, cited *supra*. On the basis of its proposal, Channel 45 Company claims 50.33% full-time integration credit.

112. Both DTI and Sinder attack Channel 45 Company's integration proposal. They argue that Channel 45 Company's limited partnership form of organization is an obvious device for maximizing the integration it can claim; that Channel 45 Company will be controlled by Oppenheimer & Co., the entity which will provide virtually all the funding; that Oppenheimer & Co. must be treated not as a limited partner, but as a general partner with an interest much greater than its 16⅔% ownership of the corporate general partner would indicate; that the integration proposal of Channel 45 Company must be adjusted to take account of Oppenheimer & Co.'s real interest in the applicant; that the integrated stockholders are

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[12] See also, *Daniel B. Bradley, et al.*, 89 FCC 2d 657 (1982).

merely nominal parties to the application and they will not have any real opportunity for influencing the legal control of the applicant; Adrian is not entitled to integration credit because his financial contribution has only been $5,000 for his 33⅓% interest in the corporate general partner; that Adrian is a lifelong resident of New York and will not abandon his life style in New York to move to Dayton; and that Blood's existing contract with Springfield Television Corp. will prevent him from fulfilling his integration proposal because he cannot own stock in Channel 45 Company.

113. The arguments advanced by DTI and Sinder have no merit under existing case law and they must be rejected. From a legal standpoint, Oppenheimer & Co. is only a 16⅔% owner of the corporate general partner and its position at this time as the only limited partner does not alter its standing in Channel 45 Company under the integration criteria. *Anax Broadcasting*, 87 FCC 2d 483, 488 (1981). Thus, the integration proposal must be evaluated by considering the roles of the stockholders of the corporate general partner without regard to the limited partner. *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71 (released December 8, 1982). On this basis, Channel 45 Company is entitled to 50.33% integration credit because of the proposals to integrate Adrian, Blood, Hawes and Lovett full time in the operation and management of the station. The argument that Adrian will not fulfill his commitment because of his life long attachment to New York is unsupported and predicated solely on speculation. The sworn commitment of Adrian cannot be ignored merely on the speculative arguments advanced by Sinder. Moreover, the release Blood obtained from Springfield Television Corp. does not prevent his ownership or participation in Channel 45 Company. It is unreasonable to argue that such release permits Blood to work for Channel 45 Company, but not own an interest therein. The original agreement with Springfield Television Corp. obviously was designed to prevent Blood from performing for a competitive station. The release from such restriction is broad enough to allow Blood to own an interest in, as well as be employed by, Channel 45 Company and Sinder's arguments to the contrary are rejected.

114. Finally, DTI's and Sinder's attempt to dilute the integration credit of Channel 45 Company by arguing that Oppenheimer & Co.'s limited partnership interest must be considered in such evaluation is unpersuasive. An evaluation similar to the one requested by DTI and Sinder was recently rejected by the Review Board in *Las Misiones De Bejar Television Co.*, FCC 83R-10, released February 11, 1983. Thus, there is no substance to DTI's and Sinder's arguments that Channel 45 Company must be saddled with Oppenheimer & Co.'s limited partnership interest in evaluating the integration credit. The fact that Oppenheimer & Co. was kept advised of the progress of the application at a time when it was only a limited partner is

understandable because it was going to finance the venture. This conduct does not establish that Oppenheimer & Co. was not a limited partner. Thereafter, when Oppenheimer & Co. became a stockholder in the general partner, in addition to a limited partner, its role appears to have been that of a minor stockholder and limited partner and its participation has been in that context. While Oppenheimer & Co. is wearing two hats, one as a 16⅔% owner of the corporate general partner which has full control of management and the second as a limited partner, its role as a limited partner is merely that of a passive investor. The fact that Oppenheimer & Co. is providing most of the financing and arguably may well have a greater influence in the venture than its 16⅔% interest in the corporate general partner are not sufficient factors under recent cases to alter Channel 45 Company's integration credit. Its interests as a stockholder in the general partner must be kept separate from its interests as a limited partner in assigning integration credit. Thus, Channel 45 Company will be credited with 50.33% integration, as previously discussed, and DTI's and Sinder's attempt to dilute such credit by assigning to Oppenheimer & Co. a greater role in the general partner is rejected.

115. Channel 45 Company's final comparative standing must include consideration of the SEC violations involving Oppenheimer & Co. Three proceedings involving various SEC violations were instituted by the SEC. The violations involve failures of Oppenheimer & Co. to comply with applicable provisions of the statute and SEC regulations dealing with security transactions. In the main, these violations resulted from the failure of officials to properly supervise account executives and other employees and to insure compliance with applicable requirements.

116. In evaluating the SEC violations, such misconduct should be reviewed to the extent that predictive judgment can be made about future broadcast performance. Relevant considerations include: (1) the nature of the misconduct, and whether it was broadcast related, (2) the frequency of the misconduct, (3) the currency of misconduct, and (4) the relationship of the wrongdoer to the applicant. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 51 RR 2d 1478, 1485 (Rev. Bd. 1982).

117. While the misconduct was not broadcast related, it nevertheless occurred in a field with a similar pervasive scheme of regulation. Moreover, the misconduct cannot be considered isolated nor stale.[13] However, the actual misconduct was not committed by any principal of Oppenheimer & Co. involved in Channel 45 Company although a present general partner of Oppenheimer & Co. was personally involved. Also, Oppenheimer & Co. only has a 16⅔% interest in the corporate general partner which will control and

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[13] Two of the three proceedings occurred in 1980.

manage the station. Under these circumstances, the impact of the SEC violations on Channel 45 Company's comparative qualifications is minimized insofar as its predictive value on prospective compliance with Commission rules is concerned, and at most only a very slight comparative demerit is warranted.

Sinder

118. Sinder proposes to integrate three stockholders as follows: Alfred Sinder, President, Treasurer and Chairman of the Board with an 83.98% interest in Sinder Broadcasting of Ohio, Inc. will be integrated full-time as the General Manager; Altagracia Ramos with a 1.78% interest will be Vice-President and serve full-time as the Community Relations Director; Lawrence Brown, with a 1.78% interest will be Vice-President and full-time Sales Manager of the proposed station.[14] Sinder's integration proposal is enhanced because Alfred Sinder has been a long time resident of Dayton with some civic participation in local organizations. He also has some limited broadcast experience. Brown is a Black American, and a resident of a Dayton suburb who has been active in youth leagues as well as a few local committees. Ramos is a Hispanic woman who has resided in Dayton since 1966. She has an exemplary record of involvement in civic and religious organizations in leadership capacities in Dayton. Thus, Sinder has 87.54% full-time integration credit.

119. At this point it is noted that Sinder has preferences under both the diversification and integration criteria and pursuant to the Commission's *Policy Statement* Sinder must be considered the preferred applicant. DTI and Channel 45 Company have attempted to discredit Alfred Sinder's proposal to integrate full-time as the General Manager of the proposed station. The arguments advanced by DTI and Channel 45 Company in this regard are unpersuasive and must be rejected. Alfred Sinder has steadfastly adhered to his sworn commitment to work full-time at the proposed station and there is no reasonable basis for ignoring such sworn testimony on the basis of the speculative arguments advanced by DTI and Channel 45 Company.

120. There are several arguments made either separately or collectively by DTI and Channel 45 Company as to why Alfred Sinder's integration proposal should not be credited. First and foremost, it is argued that Sinder will not leave Daycom, a company he bought and developed during the last two decades. According to

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[14] Sinder argues that the ownership percentage of Ramos and Brown should be increased to 5% each by giving effect to options held by these individuals. However, integration credit must be assigned on the basis of the existing interest of Brown and Ramos because the options may never be exercised. See *Peoples Broadcasting Corporation*, FCC 83R-5, released January 25, 1983. When considering options in a comparative case, an applicant should be evaluated in its most unfavorable light.

DTI and Channel 45 Company, Sinder's total involvement with this company will prevent him from leaving to work full-time at the proposed station. What DTI and Channel 45 Company ignore is that steps have been taken to relieve Sinder of his responsibility as President of Daycom. Thus, Sinder will remain as Chairman of the Board of Daycom, but will relinquish the duties of President and this will enable him to fulfill his commitment to the applicant.[15] The fact that Sinder wrote a "business plan for the 80's" for Daycom while he was recovering from a heart attack does not mean that he intended to remain as President of Daycom.

121. DTI and Channel 45 Company attempt to make much of the claimed inconsistencies in Sinder's testimony regarding the number of hours Sinder spends on Daycom business and the duties he performs. They argue that such inconsistent testimony raises questions regarding Sinder's credibility. Moreover, it is argued that Sinder minimized his role at Daycom and that his testimony was contradicted by Mr. Keelor and Mr. Gough, two former employees of Daycom. First, it is clear that both Keelor and Gough left Daycom under circumstances which would justify characterizing them as disgruntled former employees (Tr. 870–875; 921). More important, however, their testimony does not contradict Sinder's in any material manner and whatever contradictions are claimed to exist relate to matters of no decisional significance. Sinder explained and reconciled his testimony regarding the number of hours spent on Daycom business and the duties he performs, and the Presiding Judge does not perceive any material inconsistencies. *West Jersey Broadcasting Company*, 90 FCC 2d 363 (1982). In any event, the number of hours Sinder now spends on Daycom business is irrelevant because he will give up his position as President to devote full time to the proposed station. Moreover, the specific duties performed by Sinder as President of Daycom and the extent of his involvement in the day-to-day business of Daycom[16] are also largely irrelevant because he will give up that office to become General Manager of the proposed station.[17] Thus, DTI's and Channel 45 Company's efforts to find contradictions and inconsistencies regarding these matters are "much ado about nothing" that has become routine in comparative hearings. *Millard Orick, Jr.*, 89 FCC 2d 571, 573 and n. 1 (1982). In

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[15] The effort to find a successor for Mr. Sinder began about two years ago. The name of the individual selected was presented to the Board of Directors of Daycom at a meeting held in September 1982. Thus, DTI's and Channel 45 Company's reliance on *Blancett Broadcasting Co. et al.*, 17 FCC 2d 227 (1969) is misplaced because in *Blancett* the applicant could not reconcile his integration commitment with his remaining business interests. Sinder is eliminating his role as President of Daycom to meet his commitment to the applicant.

[16] Keelor corroborated Sinder's testimony that Keelor had wide latitude in running his division (Tr. 830).

[17] Sinder has also entertained offers to sell Daycom (see Sinder Ex. 15; Tr. 595).

this connection, the Review Board in *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (1982) noted that zealous advocates tend to marshall minor "application errors, omissions, or inconsistencies", in an "all but irresistible . . . attempt to stick the competition with a misrepresentation or lack of candor finding as a surefire way to secure the license". Here, neither Keelor nor Gough offered any direct testimony which impeaches Sinder's commitment. Indeed, if anything, Keelor's testimony corroborates Sinder's claim that it has been his life long dream to own and operate a television station (Tr. 888).

122. DTI and Channel 45 Company also argue that Sinder has not made public his plan to leave Daycom. They argue that in conversations with investment firms, on behalf of Daycom, Sinder did not reveal that he was planning on leaving Daycom. These arguements have no merit because Sinder was under no obligation to make such statements during preliminary discussion with investment firms. There was no absolute certainty that Sinder would be the successful applicant or when he would be leaving Daycom to serve as General Manager of the proposed station. Therefore, it would have been presumptuous, foolish, and premature for him to have stated his plans in his preliminary discussions with investment firms and no adverse inference can be drawn from this. Sinder did reveal his plans publicly at the last annual banquet of Daycom attended by employees, vendors, financers and directors. Moreover, Sinder provided the directors of Daycom with his application which clearly set forth his commitment to be full time General Manager of the station. There are no facts which would support an inference that Sinder does not intend to fulfill his commitment. Simply because Sinder did not make a public disclosure of his plans at such time, place, and to such people as Channel 45 Company or DTI would have liked, does not establish that he does not intend to fulfill his commitment.

123. DTI acknowledges that there is no direct testimony refuting Sinder's proposed integration, but nevertheless argues that Sinder's sworn testimony in this regard should be rejected, citing *Prattville Broadcasting Co.*, 5 FCC 2d 601 (1966). In *Prattville*, the Review Board stated as follows:

> Although as a general rule positive, uncontradicted testimony as to a particular fact should control the outcome of a proceeding . . . the trier of fact may refuse to accord evidentiary value to a witness' uncontradicted testimony where such testimony was found to be inherently improbable and irreconcilable with or contrary to physical facts, common observation, and experience, or where is is so opposed to all reasonable probabilities as to be manifestly false". *Prattville Broadcasting Co.*, 5 FCC 2d 601 (Rev. Bd. 1966).

124. Applying this test, the Presiding Judge concludes that there is no reasonable basis for rejecting Sinder's integration proposal on the basis of the arguments advanced by DTI and Channel 45

Company. Sinder's testimony is uncontradicted and there is nothing inherently improbable in his integration proposal. Nor is his testimony irreconcilable with or contrary to experience or reasonable probabilities as to be manifestly false. Sinder is a life long resident of Dayton and is committed to devote full time to the Dayton station. He has taken the necessary steps to accomplish this by selecting a successor to become President of Daycom when he departs thereby relieving himself of the responsibility for the day-today operation of that company. There is no direct evidence to undermine Sinder's integration proposal. The speculation, innuendos, and factually unsupported arguments of DTI and Channel 45 Company are clearly insufficient. The alleged inconsistencies and contradictions relied upon by DTI and Channel 45 Company either do not exist or are hardly sufficient to brush aside Sinder's sworn testimony. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (1982); reconsideration denied FCC 82R-77, released December 22, 1982.

125. In summary, Sinder receives 87.54% full-time integration credit; DTI receives 51%, and Channel 45 Company receives 50.33%, plus some merit for the participation of Harper. Because there is such a great disparity in full-time integration, it is unnecessary to consider the qualitative attributes of the participating owners. *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (1982); *Radio Gaithersburg, Inc.*, 72 FCC 2d 822 (1980). Sinder is entitled to a clear preference under the integration criteria.

126. Sinder has received preferences under both diversification and integration (best practicable service to the public), the two primary factors for consideration in the comparative process. Thus, a grant of Sinder's application will best serve the public interest, convenience, and necessity.[18]

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provision of Rule 1.276,[19] the application of Sinder Broadcasting of Ohio, Inc. for a construction permit for a new television station in Dayton, Ohio, IS

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[18] As between DTI and Channel 45 Company, while proposed full-time integration is almost equal (51% vs. 50.33%), because Channel 45 Company proposes to integrate three local residents who are Black Americans (including two women), an edge under integration goes to Channel 45 Company. However, the advantage is slight because the local stockholders have relatively small interests and such advantage is more than offset by Channel 45 Company's diversification demerit and slight demerit for the SEC violations. Thus, on an overall basis, DTI enjoys a slight comparative advantage over Channel 45 Company.

[19] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

GRANTED and the competing applications of Dayton Telecasting, Inc. and Channel 45 Company, ARE DENIED;

IT IS FURTHER ORDERED that the grant is subject to the following condition:

> Operation with effective radiated power in excess of 1000 kW after December 1, 1982 is subject to a further extension of consent by Canada.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH STIRMER, *Administrative Law Judge*

Appendix 1

The following companies produce and/or distribute movies:

Columbia Pictures
Disney
General Cinema Corp.
Gulf & Western
Loews
National Screen Service
Orion Pictures
Telepictures Corp.
Warner Communications, Inc.

The following companies are publishers of nationally distributed books and/or periodicals:

American Broadcasting Companies
Cox Broadcasting Corp.
MacMillan, Inc.
Norton Simon, Inc.
Time, Inc.
Times Mirror

American Broadcasting Companies own the following stations:[*]

WABC (AM) WPLJ (FM) WABC (TV)	New York
WLS AMOFM-TV	Chicago
WXYZ (AM) WRIF (FM) WXYZ-TV	Detroit
KSRR (FM)	Houston
KABC (AM) KLOS (FM) KABC-TV	Los Angeles
KGO (AM) KSFX (FM) KGO (TV)	San Francisco
WMAL (AM) WROX (FM)	Washington

Meredith Broadcasting owns the following stations:

KPHO-TV	Phoenix
WGST (AM) WPCH (FM)	Atlanta
WNEM-TV	Bay City, MI
KCMO-AM-TV KCEZ (FM)	Kansas City
WOW (AM) KEZO (FM)	Omaha
WTVH (TV)	Syracuse, NY
WPGH (TV)	Pittsburgh

Metromedia owns the following stations:

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[*] This information came from the Broadcasting/Cablecasting Yearbook 1982.

KLAC (AM) KMET (FM) KTTV (TV)	Los Angeles
KHOW (AM)	Denver
WASH (FM) WTTG (TV)	Washington
WWBA (FM)	St. Petersburg, FL
WMET (FM)	Chicago
WXIX (TV)	Newport, KY (Cincinnati)
WCBM (AM)	Baltimore
WOMC (FM)	Detroit
WTNC-TV	Minneapolis
KMBC-TV	Kansas City (sold, pending FCC approval)
WIP (AM) WMMR (FM)	Philadelphia
WNEW AM-FM-TV	New York
KRLD (AM)	Dallas
KRIV-TV	Houston
KJR (AM)	Seattle
WCVB-TV	Boston

Columbia Pictures Industries Inc. owns the following stations:

KCPX-AM-FM	Salt Lake
WWVA (AM) WCPI (FM)	Wheeling

Purchased pending FCC approval

KIQQ FM	Los Angeles
KOVR (TV)	Stockton
WTOP-TV	Washington
WDBO-TV	Orlando
WQRS (FM)	Detroit
WCMH-TV	Columbus, OH
WIOQ (FM)	Philadelphia
WJAR-TV	Providence
KSAT-TV	San Antonio

Cox Broadcasting Corp. owns the following stations:

WSB-AM-FM-TV	Atlanta
WLIF (FM)	Baltimore
WSOL-AM-FM-TV	Charlotte, NC
WHIO-AM-FM-TV	Dayton
KFI (AM)/KOSC (FM)	Los Angeles
WIOD (AM) WAIA (FM)	Miami
KTVU (TV)	Oakland, CA
WWSH (FM)	Philadelphia
WPXI (TV)	Pittsburgh

Purchased pending FCC approval

KDNL-TV	St. Louis

General Electric Company owns the following stations:

KFOG (FM)	San Francisco
KOA-AM-TV KOAQ (FM)	Denver
WJIB (FM)	Boston
WGY (AM) WGFM (FM) WRGB (TV)	Schenectady
WSIX-AM-FM WNGE (TV)	Nashville

Gross Telecasting, Inc. owns the following stations:

WJIM-AM-FM-TV	Lansing, MI
WKBT (TV)	La Crosse, WI

LIN Broadcasting Co. owns the following stations:

WAND (TV)	Decatur, IL
WIL-AM-FM	St. Louis
WBBF (AM) WMJQ (FM)	Rochester, NY
WFIL (AM) WUSL (FM)	Philadelphia
KTVV (TV)	Austin
KXAS (TV)	Fort Worth
KILT-AM-FM	Houston
WAVY (TV)	Portsmouth, VA
WEMP (AM) WMYX (FM)	Milwaukee

National Broadcasting Companies (RCA) owns the following stations:

WNBC (AM-TV) WYNY (FM)	New York
WRC-AM-TV WKYS (FM)	Washington
WMAQ-AM-TV WKQX (FM)	Chicago
WKYC-TV	Cleveland
KNBR (AM) KYUU (FM)	San Francisco
KNBC (TV)	Los Angeles

Storer Broadcasting Co. owns the following stations:

WAGA-TV	Atlanta
WSBK-TV	Boston
WJKW-TV	Cleveland
WJBK-TV	Detroit
WITI-TV	Milwaukee
KCST-TV	San Diego
WTVG-TV	Toledo

United Television, Inc. owns the following stations:

KMSP-TV	Minneapolis
KMOL-TV	San Antonio
KTVX (TV)	Salt Lake City

Westinghouse owns the following stations:

WJZ-TV	Baltimore
WBZ-AM-TV	Boston
WPCQ-TV	Charlotte, NC
WIND (AM)	Chicago
KOAX (FM)	Dallas
KOSI (FM)	Denver
WOWO (AM)	Ft. Wayne, IN
KODA (FM)	Houston
KFWB (AM)	Los Angeles
WINS (AM)	New York
KYW AM-TV	Philadelphia
KDKA-AM-TV WPNT (FM)	Pittsburgh
KJQY (FM)	San Diego
KPIX (TV)	San Francisco

Viacom International Inc. owns the following stations:

KDIA(AM)	Oakland, CA

WVIT(TV)	New Britain, CT
WMZQ(FM)	Washington
WNYT(TV)	Albany
WWRL(AM) WKHR(FM)	New York
WDIA(AM) WRVR(FM)	Memphis
KIKK(AM)	Pasadena, TX
KIKK(FM)	Houston

Purchased pending FCC approval

WLAK(FM)	Chicago

Viacom Communications, a division of Viacom International, serves certain households in the following cable systems:

In California serving:

Biggs
Colusa
Crockett
Dublin
Gridley
Healdsburg
Livermore
Marysville
Napa
Orville
Orville
Paradise
Petaluma
Pinole
Pittsburgh
Pleasanton
Red Bluff
Redding
San Francisco
San Rafael
Sonora

In New York serving:

Islip

In Ohio serving:

Dayton
Shaker Heights

In Oregon serving:

Salem

In Tennessee serving:

Nashville

In Washington serving:

Everett
Granite Falls
Lake Stevens
Lynnwood
Monroe
Oak Harbor
Seattle
Snohomish
Sultan

Cable franchises in Wisconsin serving:

Bayside
Brown Dee
Cudahy
Cudahy
Fox Point
Franklin
Glendale
Greendale
Greenfield
River Hills
Shorewood
South Milwaukee
Whitefish Bay

Common Carrier, Depreciation Rates, Prescription of

These Orders prescribe depreciation rates for the telephone companies and accounts/subaccounts shown in Appendices to the Orders.
–Depreciation Rates

FCC 83–587

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for:

American Telephone and Telegraph
Company - Long Lines Department
Michigan Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
Ohio Bell Telephone Company
Southern Bell Telephone Company
Southwestern Bell Telephone Company
Wisconsin Telephone Company

ORDER

(Adopted: December 14, 1983; Released: December 20, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *Introduction*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of these classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe revised percentages of depreciation (depreciation rates) for the eight Bell Operating Companies (BOCs) listed in the caption using both the straight-line vintage group remaining-life (remaining-life) and straight-line equal life group (SLELG) methods.

II. *Background*

A. *Remaining-Life Method*

2. Prior to 1981, we had only used the straight-line vintage group whole-life (whole-life) depreciation method in prescribing depreciation rates for telephone company plant. Using this method, we determined the depreciation accruals applicable to each year's operations using current estimates of life and net salvage. As estimates of life and net salvage changed over time, the whole-life rates were changed in accordance with the changing estimates. However, using whole-life concepts, no attempt was made to adjust the rates to allow for reserve surpluses or deficits resulting from the cumulative over- or under-estimation of life and net salvage factors. This changed with our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), where we revised Part 31 of the Rules and Regulations, the "Uniform System of Accounts for Class A and B Telephone Companies," to allow the use of the remaining-life depreciation method. The remaining-life method is designed to distribute the unrecovered cost (original cost less the sum of the depreciation reserve and future net salvage) of a group of assets over its life expectancy. Inherent in this method is an allocation of any reserve deficit or surplus over the estimated average remaining life.

3. As noted in Docket No. 20188, prior to 1981 the BOCs did not maintain depreciation reserves by plant account, but rather as one overall reserve balance. Remaining-life rates could not be determined for the BOCs until the overall depreciation reserves were allocated to the various plant accounts. In our *Supplemental Opinion and Order* in Docket No. 20188, 87 FCC 2d 1112 (1981), we concluded that the historical recordation of debits and credits is the method by which the accumulated depreciation reserve should be allocated to individual plant accounts and thereafter maintained. We stated that carriers should disaggregate the overall reserve and that henceforth each carrier should maintain depreciation reserves for each category of property for which we prescribe depreciation rates.

4. We directed the staff to phase in the implementation of remaining-life depreciation rates in conjunction with the normal triennial represcription cycle. Implementation began with those companies that were scheduled for review in 1981. Those companies submitted studies supporting revised depreciation rates using the remaining-life method. After a complete review, we adopted remaining-life depreciation rates for those companies in January 1982. *See Depreciation Rates*, 88 FCC 2d 1223 (1982). Following the same procedure, we continued implementation with the adoption in December 1982 of remaining-life rates for those companies that were regularly scheduled for depreciation review in 1982. *See Depreciation Rates*, 92 FCC 2d 920 (1982). Remaining-life rates for the remainder

of the companies were reviewed in detail this year. Our findings and conclusions regarding these rates are discussed beginning in paragraph 13. Our adoption of the remaining-life rates listed in the Appendix to this order marks the completion of the phase-in of the remaining-life method for all of the BOCs.

B. *Straight-Line Equal-Life Group Method*

5. In Docket No. 20188, we also amended our rules to permit the use of the SLELG depreciation method for new additions to plant as an alternative to the straight-line vintage group (SLVG) method, provided that adequate data is available for the proper application of the method. The primary differences between the SLELG and SLVG methods lie in the definition of the basic depreciation groups and in the approach each takes in spreading the original cost of the assets comprising the basic groups over their estimated average service lives. While SLVG forms its basic groups by combining all units placed in service in one year (i.e., a vintage group), SLELG creates its basic groups by combining all units within each vintage group which share an equal life expectancy (i.e., an equal-life group). While the SLVG method is designed to depreciate 100% of the original cost of a vintage, on average, over the life cycle of each vintage, the SLELG method is designed to depreciate 100% of the original cost of each equal life group over its life. If projections are accurate, the SLELG method should allow for depreciation at a rate more representative of the actual consumption of units of property than SLVG. We concluded in Docket No. 20188 that the proper application and monitoring of this method would not only enhance the companies' cash flow and present a more accurate and objective financial picture of the companies' operations and capital requirements, but would also benefit their customers by encouraging innovation and the introduction of new technology.

6. Under both the SLVG and SLELG methods, retirement projections, service life estimates, and depreciation rates are normally determined, in part, through the use of survivor curves. These survivor curves define the relationship between the age of plant investment and the relative percentage expected to remain in service. Under the SLELG methodology, the survivor curves assume an added significance—that of defining the basic (equal-life) groups. Under the SLVG method, most survivor curves are selected only after the staff has completed detailed statistical analysis of historical retirement data. With the added significance of the survivor curves in the SLELG method, the availability and analysis of historical retirement data as the starting point of service life analysis remains as important as ever. The added significance of the survivor curves also accentuates the need for improvements in the estimation of the technical and economic forces driving the addition and retirement of telecommunications property.

7. We recognized the importance of adequate data in our *Report and Order* in Docket No. 20188 where we found that the SLELG method is acceptable, provided that it is assured that adequate data is available for proper application of the method; that record keeping and reporting practices will enable monitoring of the reasonableness of the rate of allocation of both original cost and provisions for salvage and removal; and that such allocation of original cost will achieve allocation over the service life of the property neither more nor less than 100% of the investment net of salvage value.[1] Accordingly, we directed the staff to take such measures as may be necessary to ensure the measurability and accountability of the results under the SLELG method.

8. We directed the staff to phase in the implementation of SLELG depreciation rates beginning with the outside plant accounts, followed by the central office equipment accounts, and concluding with all other plant accounts. In accordance with this directive, the staff reviewed SLELG rate proposals for the outside plant accounts of the BOCs not scheduled for regular review in 1982 and we adopted SLELG rates for these accounts in July 1982. *See Depreciation Rates*, 90 FCC 2d 964 (1982). Additionally, we reviewed SLELG rates for the central office equipment accounts for the BOCs not scheduled for regular review in 1982 and adopted SLELG rates for these accounts in December 1982. *See Depreciation Rates*, 92 FCC 2d 693 (1982). SLELG rates for the outside plant and central office equipment accounts of the companies regularly scheduled for review in 1982 were adopted in December 1982 after a complete depreciation rate review. *See Depreciation Rates*, 92 FCC 2d 920. These actions completed the initial implementation of SLELG rates for all outside plant and central office equipment accounts for companies which have requested such rates.

9. This year the staff reviewed SLELG rates for the buildings and general equipment accounts of those companies listed in the caption which were scheduled for regular review in 1983. We are separately considering SLELG rates for the remainder of the BOCs that have requested such treatment in the other depreciation order before us today. Our adoption of these orders marks the completion of the phase-in of the SLELG method for the BOCs that have requested such treatment.

C. *Review Procedures*

10. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a company only after the following actions have been completed:

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[1] *Property Depreciation*, 83 FCC 2d at 283.

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the company's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the company's filings and the preliminary FCC staff proposals at a conference in which representatives of the company, the staffs of the respective state commission(s), and the FCC staff participate (i.e., a three-way meeting).

11. The eight Bell companies for which rates are under consideration submitted studies proposing new depreciation rates based upon revised life and salvage estimates. These studies were reviewed in detail by the FCC staff, which then prepared its own preliminary life, net salvage, and rate proposals and forwarded them to the companies and the state commissions. Some of the state commissions prepared similar studies and recommendations. Three-way meetings were then held at which the life, net salvage, and depreciation rate proposals of all three parties were thoroughly discussed.

12. After completing its analysis and arriving at recommendations, the FCC staff issued a Public Notice on September 2, 1983, entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies-Notice of Opportunity for Comment." The staff transmitted to each company and state commission a copy of the September 2 Public Notice and schedules showing the proposed remaining-life and SLELG depreciation rates.

III. *Discussion of Issues*

13. This is the third consecutive year in which we have addressed the general issues raised by our depreciation represcriptions. Accordingly, we do not here address in detail every issue raised by every commenter.[2] We focus instead on those issues that have not been raised previously and on those that affect the eight companies specifically, as opposed to depreciation rates generally.[3]

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[2] Comments were filed by American Telephone and Telegraph Co. (AT&T), ten telephone operating companies, twenty state regulatory commissions, and the National Association of Regulatory Utility Commissioners (NARUC). A copy of each of these comments and a staff-prepared summary of these comments are available for inspection in the Commission's Common Carrier Bureau offices. Although we do not specifically address each comment in this decision, we have carefully considered all the issues raised.

[3] For example, several state commissions continue to object to this Commission's preemption of state authority over depreciation rates. *See Amendment of Part 31*, 92 FCC 2d 864 (1982), *appeal pending sub nom. Virginia State Corporation Commission v. FCC*, Civ. No. 83–1136 (4th Cir. filed February 11, 1983). These commissions indicate that they have not approved the remaining-life or SLELG depreciation methods for their jurisdictions. This is not the proper forum to reargue the preemption issue, and the pendency of an appeal does not affect the

A. *Reliance on Historical Data*

14. AT&T and several of the BOCs suggested that historical plant mortality data forms the sole basis for establishing depreciation rates at this Commission. This is not true today, and to our knowledge it has never been the policy of the FCC to estimate equipment life and net salvage factors by the use of historical mortality data to the exclusion of other factors. Indeed, our Uniform System of Accounts (*See* 47 C.F.R. 31.01–3(n)) states:

> Depreciation, as applied to depreciable telephone plant, means the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of telephone plant in the course of service from causes which are known to be in current operations, against which the company is not protected by insurance, and the effect of which can be forecast with a reasonable approach to accuracy. Among the causes to be given consideration are wear and tear, decay, action of the elements, inadequacy, *obsolescence, changes in the art, changes in demand,* and requirements of public authorities. (emphasis added)

15. Historical data has often been used as a starting point in service life analysis. But, it has always formed only part of the process. Judgments regarding the strength and direction of technological and regulatory change, the impact of increasing competition, and the companies' own future construction and retirement plans have always played important parts in the life estimation process. In fact, we believe that sound projections of the life characteristics of a particular account are dependent more on the analysis of factors affecting current and future operatins than on the analysis of historical data. From account to account and study to study the essential balance between the historical data and forecasts of future plant mortality is constantly changing. We believe that the staff has been successful in maintaining this balance in the setting of depreciation lives and salvages for regulated telephone plant during this time of pro-competitive change. As we did in Docket No. 20188, we direct the staff to continue to evaluate alternative analysis procedures and to institute improved methods as necessary.

B. *Depreciation methods*

16. In our decision in Docket No. 20188 we considered the arguments expressed by the parties for and against the use of the SLELG method and determined that, provided adequate data is available, SLELG rates should be used for new assets. In the discussion in the *Report and Order*, 83 FCC 2d at 267, we found that

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enforceability of our decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, C.A. No. N83–855 (D. Md. April 7, 1983). The state commissions are required to use the depreciation rates prescribed here for state ratemaking purposes.

the use of SLELG comports with the mandate of Section 1 of the Communications Act, "to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and worldwide wire and radio communication service with adequate facilities at reasonable charges . . ." 47 U.S.C. §151. The SLELG method was adopted for new plant in order to coordinate more closely depreciation recovery with the retirement of plant. This was in part an attempt to prevent new reserve deficits or surpluses from occurring. We reaffirmed our decision to allow the use of the SLELG method in our *Order on Reconsideration* in Docket No. 20188, *supra*, as well as in three 1982 prescription orders. *See Depreciation Rates*, 88 FCC 2d 964; 92 FCC 2d 920; and 92 FCC 2d 693. Nevertheless, several states have again questioned whether the use of SLELG rates is warranted. Inasmuch as these states have not raised any new arguments or evidence regarding the use of SLELG rates, we have no basis to reverse our decision on this matter. Our Rules, as amended in Docket No. 20188, clearly allow the use of SLELG for new investments for accounts in which adequate data is available to properly apply and monitor it. For virtually all accounts in which we are considering the prescription of SLELG rates, the companies have demonstrated their ability to provide adequate data. Consequently, we will allow its use.

17. There are a few exceptions. For example, in our 1982 SLELG orders we found that the SLELG method cannot be properly applied to the electromechanical switching accounts because projection life tables could not be developed with even a minimal degree of accuracy. In this proceeding AT&T stated that it had submitted sufficient data to support the use of the SLELG method for Long Lines' COE-Crossbar account. Furthermore, it argued that it can predict additions and retirements of crossbar equipment without significant deviation from one year to the next. The planning lists that it provided this, however, do not support this contention. Although the average dates of retirement derived from these lists did not change to a great extent, the specific dates of retirement for many of the offices did change dramatically. This is the very reason we rejected the use of SLELG rates for electromechanical switching equipment in our 1982 orders. Therefore, we reiterate our position that SLELG rates will not be prescribed for electromechanical switching accounts and that SLVG remaining-life rates will continue to be used for AT&T as well as the BOCs.

18. In our decision in Docket No. 20188 we also directed the staff to undertake the review of remaining-life depreciation rates for embedded investment in all plant accounts. This method was adopted in an attempt to allocate existing reserve deficits over the remaining life of embedded plant not subject to SLELG treatment. We have reaffirmed this decision in two prescription orders. *See Depreciation Rates*, 88 FCC 2d 1223 and 92 FCC 2d 920. Neverthe-

less, several states have questioned the use of the remaining-life method on the grounds that it fails to match depreciation expenses with capital consumption by changing accrual rates to recover embedded reserve deficiencies. Our goal has been, and will continue to be, the distribution of the full cost of an asset in reasonable manner over its service life. We continue to support our decision to implement the remaining-life method, noting that the "true-up" of reserve imbalances over the remaining life of an account was the primary reason for our decision in Docket No. 20188.

19. AT&T and the BOCs now charge that although we have recognized the existence of reserve deficits, we have not moved strongly enough to eliminate the danger that the net investment still to be recovered may be greater than the capacity of the property to produce future earnings. Although we adopted the remaining-life and SLELG methods and reduced service lives for many accounts during the last represcription period, the companies argue that the magnitude of the reserve deficits requires additional life reductions and methods changes.

20. The magnitude of the reserve deficit is subject to widely varying estimates depending upon the life parameter estimates, depreciation methods, and weighting procedures employed. AT&T and the BOCs have estimated that the theoretical reserve requirement is in excess of 40% of original cost using company proposed lives and methods. The FCC staff has estimated the BOC reserve requirements to average approximately 32% based upon its life and salvage estimates and methods currently in use to determine depreciation rates.

21. AT&T and the BOCs support their higher estimates of reserve requirements by claiming that increasing competition in all phases of telecommunications and an accelerating pace of technological obsolescence of plant require that the reserve levels be raised to that of their competition by prescription of service lives and depreciation methods that will produce faster recovery. The competition allegedly includes companies such as ITT, IBM, Xerox, MCI, Texas Instruments, and the CATV industry. All of these firms allegedly have depreciation reserves in the 35 to 55% range. In its comments NARUC has made a convincing case that these companies are not comparable to the BOCs. With the exception of the CATV industry and ITT, which has a minor portion of its business in the telephone utilities industry, none of the foregoing companies are public utilities. Most of them are manufacturing companies with little investment in telephone plant. AT&T's investment in general use equipment is probably more comparable to the investment base of these firms than any other segment of its investment. AT&T's reserve ratio for its general use investment is much higher than that for its specialized utility plant; thus, the reserve ratio for this equipment is apparently much closer to that of its so-called

competitors. Finally, in order to make a valid comparison of reserve ratios, it must be demonstrated that the companies being compared have plant investments with a similar composition and age. AT&T and the BOCs have not provided adequate information to demonstrate that their plant investments are comparable to even MCI or the CATV industry. We believe that comparability is unlikely because telephone operating companies have an investment which is heavily weighted by long-lived assets such as outside plant and buildings.

22. Another AT&T claim, that company plant modernization and competitive vigor are threatened by massive reserve deficits, is contradicted by the fact that in 1982 AT&T was able to finance virtually its entire capital construction program through internally generated funds.[4] Additionally, modernization as a percentage of total AT&T capital expenditures has consistently increased from 8% in 1968[5] to 22% in 1982.[6] These facts do not support the charge that a capital recovery crisis is imminent because of failure to recover more rapidly recognized reserve deficits or that our depreciation policies are impeding plant modernization.

23. Nevertheless, AT&T and the BOCs stated that they are faced with serious depreciation reserve deficiencies which require changes in both service lives and depreciation methods. They opposed the continued use of the remaining-life method for eliminating the reserve deficit on the grounds that this method shifts a major portion of the recovery far into the future. As a result, they proposed a change to what they refer to as the straight-line age-life (SLAL) method. This method is similar to that which we currently use with two exceptions: (1) SLAL employs the SLELG method for embedded plant; and (2) SLAL uses current theoretical reserve studies to allocate account-level reserves to each vintage and uses net plant weighting procedures based upon these allocated vintage reserves.

24. We rejected the first proposed exception in Docket No. 20188 in which we found that SLELG should be applied to new additions only for the following reasons: (1) the use of the SLELG method for embedded plant would require more calculations and more detailed recordkeeping and, thus, increase the workload of the FCC and state public utility staffs; (2) the use of SLVG remaining-life rates for embedded plant will assure the attainment of 100% capital recovery, the same result that would ensue from the use of SLELG, so it is not necessary to apply SLELG rates to embedded vintages of plant; (3) there is a lack of disaggregated reserve data for embedded plant, which impedes the identification and correction of deficiencies

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[4] 1982 AT&T Annual Report, page 34.

[5] 1973 AT&T Annual Statistical Report, page 3.

[6] 1982 AT&T Annual Statistical Report, page 2.

arising from cumulative past errors; and (4) introduction of new methods in mid-stream would complicate already difficult problems.

25. We have reexamined this issue and determined that our original decision was proper and is, in fact, consistent with the views given by NARUC on page 99 of *Public Utility Depreciation Practices* (1968), in which it is stated:

> The introduction of proposals to shift from one basic method to another usually involves problems in achieving the required reserve level appropriate for the new method and in avoiding sudden large changes in the overall level of depreciation expenses. A plan which has been used to overcome both of these problems is to split the plant by vintage before and after the conversion date and start all later vintages under accruals determined by the new method while continuing the older vintages on the former plan.

26. The second proposed exception, i.e., the use of net plant weighting based upon vintage reserves derived from current theoretical reserve studies, is also inconsistent with our depreciation policies. In our *Supplemental Opinion and Order* in Docket No. 20188, *supra*, we found that it is inappropriate to allocate book reserves using current theoretical reserve studies. In that order we stated that such an allocation must be based upon the actual debits and credits that have occurred over time. Inasmuch as depreciation rates have not been set by vintage, we believe it is virtually impossible for vintage reserves to be derived for embedded plant. Thus, we believe that net plant weighting cannot adequately be carried out for embedded plant. This is not to say the use of net plant weighting is without merit. If vintage reserves can be maintained from the outset of a vintage, it may be a viable procedure. In fact, we believe it may be feasible to maintain vintage reserves for the SLELG vintages. If procedures are developed to do so, we will consider the use of net plant weighting for these assets in future prescriptions.

27. Another consideration regarding the selection of the proper method is the pattern of capital recovery that will result. Our staff has examined this matter and has determined that the use of the SLAL method would immediately raise depreciation rates for most of the BOCs by from two to three percent of their original costs. Nationwide, this amounts to approximately four billion dollars a year in increased depreciation expense. This large increase using the SLAL method would be followed by a rapid decrease in depreciation expense to less than that which would result from the use of existing methods by 1990. Most of the state commissions are opposed to this procedure, in part because it would introduce an unjustified volatility of depreciation expenses and, thus, overall rate levels. We agree that during a period in which significant reserve deficiencies exist, the use of the SLAL method would result in too much volatility in the capital recovery pattern and is unacceptable.

28. As an alternative to the adoption of the remaining-life and

SLAL methods, several companies and state commissions proposed, as a general rule, the amortization of net book cost over a period other than the remaining-life. Neither the companies nor the state commissions provided convincing arguments that the remaining-life method is not adequate, nor that their proposed amortization procedures are necessary. We considered the use of amortization to eliminate reserve deficits in Docket No. 20188, *supra*, but we rejected it in favor of the use of the remaining-life method. As stated in paragraph 18, we continue to support the use of the remaining-life method to "true-up" reserve imbalances.[7]

C. *Composite Rates*

29. Since our first SLELG prescription order in January 1982, we have prescribed separate SLELG rates for each new vintage of most accounts. Inasmuch as we have only dealth with a few vintages, this practice has not caused major administrative or monitoring problems; however, if we were to continue this practice, the administration of our depreciation prescription program would become much more complex. For example, by 1990 we would be prescribing ten rates for each of approximately thirty plant accounts for each jurisdiction. Primarily for this reason, in our *Report and Order* in Docket No. 82–513, 48 FR 5928 (2/9/83), we directed the staff to review the concept of composite rates for SLELG vintages. During the past year the staff has examined this idea and determined that the use of composite SLELG rates is not only feasible but would greatly simplify the administration of SLELG rates. Although Michigan Bell and Southern Bell filed comments in opposition to a composite rate plan, the other respondents agreed with the staff that the use of composite rates would ease the administration and monitoring of SLELG rates.

30. Most of the parties suggested that three separate rates should be prescribed for each account, one for the original cost of the SLELG vintages, one for the original cost of the SLVG vintages, and one for net salvage for the account as a whole. Although we prefer the use of one composite rate for each account, three rates are much preferred over our current procedure in which an additional rate is required for each new vintage of each plant account. We believe that we can adequately administer three rates for each account. Therefore, we will prescribe three composite rates for each account as described above. In addition we direct the staff to evaluate this procedure and inform us if further changes or refinements are necessary.

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[7] There are special circumstances, particularly during the transition from the whole-life to the remaining-life method, when the use of an amortization procedure may be a more practical solution than the use of the remaining-life method. Such circumstances and our proposed solutions are discussed beginning in paragraph 42.

31. All composite rates proposed herein are calculated using the gross plant weighting compositing procedure specified on page 173 of NARUC's *Public Utility Depreciation Practices* (1968). If this procedure is used, the accruals resulting from the application of an account's composite rate to its plant balance will equal the sum of the accruals resulting from the application of the vintage rates to the vintage plant balances.[8] Thus, the use of the proposed compositing procedure will have no appreciable revenue requirement impact.

D. *Annual Update of Composite Rates*

32. The use of composite SLVG, SLELG, and net salvage depreciation rates necessitates consideration of annual updates to keep these rates current. Numerous state commissions joined NARUC in urging that these updates should reflect changes due to plant additions and retirements without altering the agreed-upon service life and salvage estimates. Several of the BOCs argued that reliance on mere "technical" updates will impede the resolution of reserve deficiencies. They supported annual updates that would include full reviews of life and salvage factors, at least for those accounts with large reserve imbalances.

33. We have already ordered optional annual updates for dying accounts of companies that were reviewed in 1982. *See Depreciation Rates*, 92 FCC 2d 920. We can find no reason not to extend this procedure to all accounts to assure that composite rates are kept as current as possible. (Indeed, the California Commission has long employed annual updates of remaining-life rates.)

34. In its comments Michigan Bell stated that the present three-year represcription of depreciation rates is unacceptable until realistic lives and salvages are authorized and until the SLAL method is adopted. We have no intention of prescribing rates for Michigan Bell based upon unrealistic life and net salvage factors. Furthermore, we do not agree that lives are changing so rapidly that annual consideration is routinely required. In fact, the remaining-life method is designed to include a true-up component to deal with variations in life and salvage that may occur because of life and salvage estimation errors or changes between represcriptions. We believe that the periodic, detailed study of rates (i.e., every three years) coupled with annual updates and the use of the remaining-life method will result in timely capital recovery in all but the most extreme circumstances.[9] To assure full and timely capital recovery we direct the staff to perform annual technical updates of the remaining-life, SLELG, and net salvage composite depreciation rates

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[8] Using this procedure vintage-level factors are calculated, but not prescribed.

[9] Nothing in our Rules prevents a company from keeping us informed of extraordinary situations that could justify depreciation reviews outside the normal triennial represcription process.

ordered in the Appendix as requested by the companies or as deemed necessary by the staff.

E. *Life and Net Salvage Factors*

35. Three-way agreement on life and salvage factors was achieved for most accounts of six of the BOCs under consideration in this order. Only two-way agreement between the state commissions and FCC staff was achieved for many accounts of Michigan Bell and Southern Bell. In its September 2, 1983, Public Notice the staff noted the disagreements with Southern Bell and Michigan Bell as well as a few outstanding life and salvage disagreements for Southwestern Bell and Northwestern Bell. In response to this notice we received comments from the companies and state commissions and have considered them in reaching our decision for each account for which three-way agreement was not achieved at the staff level.

36. The account in which there were fewer staff level agreements than any other is the COE-Electronic account. Three-way agreement was achieved for approximately half of the states served by the BOCs under consideration in this order. For the other half, two-way agreement was achieved with the state commission or company. Southwestern Bell, Michigan Bell, and Southern Bell alleged that the two-way agreements for COE-Electronic lives are much too long for timely capital recovery. In contrast, the South Dakota Commission argued that the life proposed by the staff for COE-Electronic in Northwestern Bell's South Dakota jurisdiction is too short. In no case do those parties disagreeing with the staff present any new arguments or additional information that would lead us to alter the staff's original two-way life agreements for this account. Additionally, the lives being proposed by Michigan Bell, Southern Bell, and the South Dakota Commission are not consistent with the three-way agreements which were reached for the other jurisdictions. Therefore, we adopt the staff's recommendation of life and salvage factors for COE-Electronic as reflected in the depreciation rates shown in the Appendix.

37. The staff was unable to reach agreement with the state and company during the three-way conference as to the appropriate life for Northwestern Bell's Pole Lines investment in South Dakota. As a result, discussions continued after the conference. In these further discussions Northwestern Bell provided additional information which indicated that recent life indications for Pole Lines in South Dakota have dropped to well under the nine year life that it proposed to represent future mortality. The South Dakota Commission argued that these very low life indications occurred concurrently with a major company program designed to upgrade its rural customers from multi-party to one- and two-party service. Inasmuch as this program was completed in 1979, South Dakota expected the life indications to rise to more normal levels. Our staff has reviewed

more recent information and, as South Dakota suggested, life indications have increased rapidly since 1979 to a level in excess of twelve years. As a result, we agree to the twelve year projection life proposed by South Dakota.

38. We also received comments regarding the life and salvage parameters for Northwestern Bell-South Dakota's Underground Cable-Toll account, for Southwestern Bell-Arkansas' Telephone and Miscellaneous and Large PBX accounts, and for various accounts of Michigan Bell and Southern Bell for which three-way agreement was not achieved. These comments provided no additional information or argument that the parties had not already considered in reaching their initial two-way agreements. The life and salvage factors underlying the two-way agreements are consistent with those factors which underlie the proposed rates for the jurisdictions in which three-way agreement was achieved. As a result, we concur in the life and salvage proposals of the staff as reflected in the depreciation rates shown in the Appendix.

39. The Ohio Commission objected to the use of the projection life table (PLT) in the calculation of SLELG depreciation rates. Instead, it contended that the average service life (ASL) should be used. The PLT underlying the currently prescribed rate is designed for use in forecasting future mortality of both new as well as embedded assets.[10] On the other hand, the ASL underlying the currently prescribed depreciation rate is the composite of the average life of assets already retired and the forecasted average life of assets in service as of the last study. If the ASL were used, we would be assuming that new assets will have the identical life characteristics of embedded and previously retired assets. We find this assumption unacceptable. Inasmuch as we are prescribing SLELG rates for new assets only, we find that the PLT is the preferred parameter to use. It should be noted that not all accounts have been studied using PLTs. For these accounts, alternative parameters have been used.

40. The Ohio Commission also objected to the use of the future net salvage in the calculation of SLELG depreciation rates. Instead, it contended that we should use the average net salvage. Here, too, we are prescribing SLELG rates for new assets only; accordingly, the future net salvage is the preferred parameter to use in determining the net salvage segment of the SLELG rate.[11]

41. Additionally, the Ohio Commission objected to the FCC

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[10] To forecast future mortality of new assets, the entire PLT is used; to forecast future mortality of embedded assets, the PLT beyond the age of the assets being considered is used.

[11] In certain instances the use of the average net salvage may be appropriate, e.g., when there is a strong, well-defined relationship between the age of retirements and net salvage. However, this is not the case for the accounts studied here. This issue is discussed more fully in *Depreciation Rates*, 90 FCC 2d 964 (1982).

staff's and Ohio Bell's use of curves derived from the Gompertz-Makeham analysis in arriving at SLELG depreciation rates for Ohio Bell. It contended that we should use Iowa curves.[12] The Gompertz-Makeham analysis has been used extensively in developing projection life tables by the BOCs and the FCC staff for at least the last 30 years. We know of no evidence demonstrating that the use of one of these procedures leads to a depreciation rate appreciably different from that which would result from the use of the other procedure. In fact, the adequacy of both methods is well documented in various literature on depreciation. For example, in NARUC's *Public Utility Depreciation Practices* (1968), the use of both Gompertz-Makeham and Iowa curves are two of several methods discussed for use in the mathematical curve fitting of observed retirement data. NARUC does not, however, give a preference of one method over the other method. Furthermore, the Ohio Commission provided no evidence to support its contention that Iowa curves should be used. We believe that both methods have merit if properly applied, and we have no preference for one over the other. The staff has developed the computer software to support the use of both methods; therefore, either method can be administered adequately. Consequently, we have no objections to a company using either method at this time. Inasmuch as both methods are generally accepted, we can see no need to require Ohio Bell to use Iowa curves.

F. *Amortization and Dying Accounts*

42. In Docket No. 20188 we expressed our concern that depreciation rates be prescribed in a manner that would assure 100% capital recovery. Consistent with this policy, we revised our rules to allow for the use of the remaining-life and SLELG depreciation methods. In the two years since we first prescribed rates using these methods, there have been several instances in which plant balances approached or reached zero and the associated reserve balance was significantly positive or negative. Such occurrences were expected during the transition to the new methods because the prior whole-life method made no attempt to resolve reserve problems that had developed over a period of years. It should be noted that the causes of these imbalances have not necessarily been determined to be those envisioned in the portion of our Rules related to the disposition of reserve problems (*See* 47 C.F.R. 31.02–83). A few state commissions commented that the resolution of such problems should be left to their discretion. Such a policy would clearly be inconsistent with our position on preemption of depreciation matters. As a result, we find this suggestion to be without merit. Nevertheless, we direct the staff

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[12] The Iowa Type Survivor Curves were developed by the Engineering Research Institute, Iowa State University. These curves, commonly referred to as Iowa curves, are used extensively in describing retirement dispersion for utility plant.

to solicit actively state views on reserve problems and keep us informed if alternative treatments are indicated.

43. In the Public Notice the staff proposed four procedures designed to reduce the chance that a significant reserve deficit or surplus would occur for a dying account, and to provide a mechanism to eliminate the deficit or surplus which will inevitably arise at the demise of an account. These procedures are as follows:

(1) When a zero plant balance occurs and there is a small reserve balance, charge or credit this balance to the depreciation expense account.

(2) When a zero plant balance occurs and there is a material reserve balance, amortize the balance over a period to be determined by the Commission.

(3) When a plant balance is small and a large reserve deficit exists, apply the depreciation rate to the net book cost instead of the original cost. This would avoid the necessity of prescribing extremely high rates and ease the administration of the depreciation process in the last few years of a dying account, yet have no significant impact on actual expense levels.

(4) If in any month the prescribed annual accrual is such that the reserve balance would exceed the service value, the company would be required to reduce the accrual such that the reserve balance would not exceed the service value.

44. The first two procedures proposed by the staff cover situations in which there is a zero plant balance and a non-zero reserve balance. With no assets in service and, thus, with no remaining life, the remaining-life depreciation method clearly cannot resolve the reserve imbalance. We believe, as do most of the commenting parties, that the procedures proposed by the staff will adequately resolve the reserve imbalances. We offer the following to clarify the procedures to be employed.

45. For an account in which the plant balance is zero and the reserve balance is material, the company is required to file with this Commission a report which contains the amount of the reserve, a description of the conditions which created the reserve imbalance, and the company's proposed accounting treatment to resolve the imbalance. Unless otherwise stated or approved, we will consider any amount in excess of 1% of a carrier's annual depreciation expense in the jurisdiction in question to be material and, thus, to require filings. Among the accounting options we will consider are as follows: (1) booking the reserve amount as an extraordinary retirement (account 138) with an amortization of that amount through account 609 over a specified period; and (2) amortization of the reserve amount through depreciation expense (account 608). The filing must be made 90 days prior to the company's closing of its annual books of account, and a copy is to be concurrently submitted to the state commission having jurisdiction. For an account in which the plant balance is zero and the reserve balance is not material, the company must charge or credit the amount of the reserve balance to account 608.

46. We believe that situations in which the plant balance drops to zero while the reserve balance is other than zero will occur in the future in a few accounts. However, we believe that instances in which the reserve balances are material should occur very infrequently, inasmuch as the remaining-life depreciation method we have adopted and our Rules regarding extraordinary retirements will allow for the timely recovery of these reserve deficiencies.

47. This year only one company filed for amortization of a large reserve deficit for an account with a zero balance. Southwestern Bell-Arkansas requested a five year amortization period to eliminate a two million dollar reserve deficit in its Aerial Wire-Toll account. The staff determined that this amortization period was acceptable because it did not unduly distort annual depreciation expense and yet did recover the deficiency in a timely manner. The Arkansas Commission did not offer any specific alternative proposal. Therefore, we find the proposed amortization expense, as reflected in the Appendix, to be acceptable.

48. The third procedure proposed by the staff is aimed at resolving reserve imbalances for those accounts with existing plant balances. Michigan Bell, Northwestern Bell, and Southwestern Bell argued that the staff's proposed procedure is counter to the Commission's Rules (*See* 47 C.F.R. 31.02–81(a)) which do not provide an account for net plant. Most commenting parties stated that the staff's proposal would be difficult to administer and would not allow for full capital recovery. Although we do not agree that the use of this procedure is inconsistent with our Rules, we do agree that the specific procedure proposed in the Public Notice may prove cumbersome and may not result in 100% capital recovery. However, we believe that if the staff's proposed procedure is modified as discussed below, it could be used to resolve such reserve problems in an effective manner.

49. In accounts with large reserve imbalances such that the application of the remaining-life depreciation method would result in extremely high depreciation rates (i.e., approaching or in excess of 100%), we direct the staff to determine a reasonable period over which the net book cost less estimated future net salvage can be amortized. The net book cost as of the study date less the future net salvage should be divided by the amortization period to determine the equal annual amount to be charged to depreciation expense (account 608). In selecting an amortization period the staff should consider our policy to write off the investment in a timely manner while not overly distorting the income statement of any given period.

50. The staff determined that this year there are a number of accounts for which the remaining-life depreciation rate approaches or exceeds 100% of original cost. For these accounts the staff determined amortization periods that would provide for capital recovery in a fair and equitable manner. For most of these accounts

the company, state commission, and FCC staff are in full agreement on the amortization period. However, in the Northwestern Bell-South Dakota jurisdiction the company proposed a three year amortization period for the COE-Manual and Aerial Cable-Toll accounts, while the state commission requested an eight year period. We believe that it is in the interest of both the company and its ratepayers to eliminate these reserve imbalances as quickly as possible without imposing a material impact on total depreciation expenses in any one year. The staff has examined the expense impact of the proposed three-year amortization period and found that for neither account does it exceed 1% of total jurisdictional depreciation expense. We can find no reason to adopt the eight-year amortization period proposed by the state commission. Therefore, we accept the three-year amortization period as proposed by the company.

51. In addition to the amortizations proposed by the companies, the staff determined that there were a number of other accounts for which the proposed remaining-life rates approached or exceeded 100%. Considerations of expense impact indicated that the net book costs less future net salvages in most of these accounts could be amortized over a period equal to the remaining lives agreed to at the three-way meetings. However, for the Station Apparatus-TTY account of AT&T Long Lines, an amortization over the three-year remaining life would amount to almost 2% of the annual depreciation expense. The staff proposes to use a five-year amortization period for this account to lower the impact on depreciation expense to approximately 1% per year. For the Aerial Wire-Toll account of Southwestern Bell-Kansas the use of the agreed-to remaining life of 1.4 years would also produce an amortization expense that approached 2% of the annual depreciation expense. For this account the staff proposes a three-year amortization period to reduce the expense impact to approximately 1% of jurisdictional depreciation expense. It is important to note that these imbalances are the result of the transition from the whole-life to the remaining-life methods. This type of problem should occur very infrequently in the future.

52. The following table lists all accounts for which the staff is proposing amortizations, along with the amortization periods recommended by the staff:

Jurisdiction	*Account*	*Amortization Period (Years)*
AT&T Long Lines	Station App.-TTY	5
Michigan Bell	Aerial Wire	2.6*
Northwestern Bell-Iowa	Aerial Wire	5
Northwestern Bell-Minnesota	Aerial Wire	5

Jurisdiction	*Account*	*Amortization Period (Years)*
Northwestern Bell-Nebraska	Aerial Cable-Toll	2
	Aerial Wire	7
Northwestern Bell-North Dakota	Aerial Cable-Toll	2
	Aerial Wire	7
Northwestern Bell-South Dakota	COE-Manual	3
	Aerial Cable-Toll	3
	Aerial Wire	8
Southern Bell-Florida	COE-Manual	4.4*
Southern Bell-Georgia	COE-Manual	3.7*
Southwestern Bell-Kansas	Aerial Wire-Toll	3
Southwestern Bell-Missouri	Aerial Wire-Toll	1.1*
Southwestern Bell-Oklahoma	Aerial Wire-Toll	1.0*
Southwestern Bell-Texas	Aerial Wire-Toll	1.0*

*The amortization period is equal to the estimated remaining life.

We concur in these staff amortization proposals and find that they do not delay capital recovery nor unduly distort depreciation expenses in any one period.

53. The staff's fourth proposal was to require the cessation of depreciation accruals for any account which has reached service value. This proposal was generally supported by the companies and the states. However, there was concern that accruals would be stopped in one month and then restarted in the next month if a new plant addition caused the service value to exceed the depreciation reserve creating a month-by-month seesaw effect. We believe that if the service value check is made annually instead of monthly, most of these problems could be avoided. Thus, we direct the companies to reduce accruals for any account in any year to the degree required to avoid exceeding service value in that year. Further, we direct the companies to inform the FCC staff by letter of these actions. In the event that additions to the account leave the reserve level below its new service value, accruals should be reinstituted and the FCC staff should be informed.

G. *Negative Depreciation Rates*

54. In a few accounts with minimal plant balances, the use of the remaining-life method would result in negative depreciation rates because the reserve balances were in excess of service values (i.e., original cost less net salvage). The staff reviewed several of these instances and found that the primary cause was the transfer of plant from one account to another without a corresponding transfer of reserve amounts. The prescription of a negative depreciation rate is not consistent with generally accepted accounting principles. Therefore, we will adopt the use of a 0% depreciation rate for all accounts where the calculation of remaining-life depreciation rates would

result in a negative rate. We recognize that this action does not totally resolve the problem (i.e., reserves greater than service values). However, the problem is technical in nature and can probably best be resolved at the staff level. We direct the staff to work with the carriers to determine what reserve transfers, if any, are required.

H. *Submission of Whole-Life Depreciation Studies*

55. In paragraph 82 of our *Report and Order* in Docket No. 20188, 83 FCC 2d at 290, we directed the staff to

> . . . keep the Commission fully informed as to the difference in amounts of annual charges involved in any recommendations for prescribed rates that it might make. For at least a period of three years, we require that all rates recommended for prescription carry with them a statement of the dollar impact in terms of annual expense, as between the rates calculated under the whole-life concept. Thereafter, the staff is to advise the Commission as to such differences wherever the proposed remaining-life rates results in an increase in proposed annual charges of 115% or more than the increase in annual charges arrived at by calculating whole-life rates.

56. With the prescription of the depreciation rates shown in the Appendix, we are completing the implementation of remaining-life rates for all of the BOCs. However, after prescribing remaining-life rates for three years and considering the controversy that has developed regarding the pace at which reserve deficits are being written down, we find that it is more essential than ever that the companies file rates on both a whole-life and remaining-life basis. Inasmuch as the computerized systems which the carriers and regulators have in operation can easily determine both whole-life and remaining-life factors, we find that reporting both figures will cost the carriers and regulators very little. We, therefore, require the companies to continue to report whole-life rates to the Commission for at least the next three-year prescription cycle.

I. *Effective Dates*

57. With few exceptions, prior to 1981 depreciation rates were prescribed retroactively to the beginning of the year in which they were filed. This appeared to be a reasonable practice because the rates were based on depreciation studies made as of the beginning of the review year. In depreciation prescription orders issued in 1981 and 1982, after considering the regulatory and financial reporting aspects of effective dates (especially the matching of revenues to depreciation expenses), we determined that during the transitional period from whole-life to remaining-life and SLELG methods, we would allow the booking of the new rates on the various effective dates proposed by the companies. *See Depreciation Rates*, 88 FCC 2d 1223; 88 FCC 2d 964; 92 FCC 2d 920 and 92 FCC 2d 693. Inasmuch as this order represents the third and final phase of the transition to

the new methods, we shall again grant the effective dates proposed by the companies.

J. *Conclusion*

58. Having considered the proposals of the companies, the positions set forth by the companies and state commissions at the three-way meetings, the responses to the staff's review letters and Public Notice, and the recommendations of the staff, we adopt the remaining-life, SLELG, and net salvage depreciation rates listed in the Appendix.

IV. *Ordering Clauses*

59. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

60. IT IS FURTHER ORDERED, That the companies shall submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment: Appendix

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
AMERICAN TELEPHONE AND TELEGRAPH COMPANY - LONG LINES DEPARTMENT

		Investment Recovery		
Acct. No.	*Class or Subclass of Plant*	*SLVG Rate** (1%)	*SLELG Rate#* (1%)	*Net Salvage Rate** (1%)
212	Buildings	2.6	7.1	−0.1
221	Central Office Equipment			
	Manual	32.0		3.2
	Crossbar	26.7		−0.4
	Non-Ded. Circuit	7.2	10.2	−0.5
	DDS Circuit	9.6	14.9	−0.3
	Radio	4.2	6.2	0.3
	Electronic	4.8	7.9	−0.1
	Radio Satellites		10.0	0.0
231	Station Apparatus			
	Teletypewriter[1]			
234	Large Private Branch Exchanges			
	Other	6.9		−2.9
241	Pole Lines	0.2	12.4	1.2
242.1	Aerial Cable	11.9		24.6
242.2	Underground Cable	4.6	5.3	0.3
242.3	Buried Cable	5.3	4.5	0.0
242.4	Submarine Cable	4.8	4.3	−0.3
243	Aerial Wire	4.9		6.9
244	Underground Conduit	2.2		0.0
261	Furniture & Office Equipment	3.7	6.3	−0.2
	Computer Equipment	11.8	14.3	−1.1
264	Vehicles & Other Work Equipment			
	Motor Vehicles	11.3	17.5	−2.4
	Tools & Other Work Equipment	7.0		−0.3

* Effective June 1, 1983.
# Effective January 1, 1983.

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[1] The January 1, 1983 net book cost less the future net salvage estimate of 1% is to be amortized in equal amounts over a 5 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
MICHIGAN BELL TELEPHONE COMPANY

Effective January 1, 1983

		Investment Recovery		*Net*
Acct. No.	*Class or Subclass of Plant*	*SLVG Rate* (%)	*SLELG Rate* (%)	*Salvage Rate* (%)
212	Buildings	2.5	4.3	−0.2
221	Central Office Equipment			
	Manual	26.2		20.9
	Step-by-Step	10.6		1.0
	Crossbar	16.2		1.5
	Non-Ded. Circuit	6.2	10.3	0.4
	DDS Circuit	7.1	11.6	0.7
	Radio	6.6	11.8	0.1
	Electronic	5.6	8.6	−0.2
231	Station Apparatus			
	Teletypewriter	14.8		−0.1
	Telephone & Miscellaneous	12.1		0.0
	Radio	7.0		−0.2
232	Station Connection - Other	5.0		
234	Large Private Branch Exchanges			
	Other	36.9		0.2
	Electronic	14.7		−1.4
	DDS	15.4		−2.7
241	Pole Lines	3.5	11.3	2.4
242.1	Aerial Cable			
	Exchange - Other	7.1	9.8	0.7
	Exchange - House	4.1	8.2	1.0
	Toll	3.3	11.5	1.5
242.2	Underground Cable			
	Exchange	3.1	6.2	−0.3
	Toll	4.3	4.9	−0.1
242.3	Buried Cable			
	Exchange	3.8	4.9	0.2
	Toll	3.9	4.4	−0.1
	Buried Wire - Exch. & Toll	14.0	14.4	1.1
242.4	Submarine Cable	3.6	4.3	0.0
243	Aerial Wire[1]			
244	Underground Conduit	1.8	1.8	0.2
261	Furniture & Office Equipment	1.8	1.8	0.2
	Furniture	11.3	20.8	−0.2
	Computers	14.3	20.4	−0.7
264	Vehicles & Other Work Equipment			
	Motor Vehicles	8.4	13.3	0.0
	Other Work Equipment	6.3	16.7	−0.4

[1] The January 1, 1983 net book cost less the future net salvage estimates of −80% is to be amortized in equal amounts over a 2.6 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depression for
NEW YORK TELEPHONE COMPANY (NEW YORK AND CONNECTICUT)

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate** (%)	*Recovery SLELG Rate#* (%)	*Net Salvage Rate** (%)
212	Buildings			
	Buildings	1.8	4.0	0.1
	Building Fixtures	5.6	14.1	0.3
221	Central Office Equipment			
	Manual	42.8		6.1
	Step-by-Step	16.0		1.7
	Crossbar	6.1		0.7
	Non-Ded. Circuit	5.0	12.0	0.6
	DDS Circuit	7.8	17.5	0.3
	Radio	5.1	11.2	−0.1
	Electronic	4.9	7.2	−0.3
231	Station Apparatus			
	Teletypewriter	12.6		0.0
	Telephone & Miscellaneous	15.3		−1.2
	Radio	10.4	0.1	
232	Station Connections - Other	2.5		
234	Large Private Branch Exchanges			
	Other	41.1		3.4
	Electronic	17.1		−1.3
	DDS	19.2		−1.4
241	Pole Lines	2.7	7.2	2.6
242.1	Aerial Cable			
	Subscriber - Building	3.1	6.1	1.0
	Subscriber - Other	4.3	5.6	1.1
	Trunk	1.9	9.0	0.0
242.2	Underground Cable			
	Subscriber	2.7	5.4	0.2
	Trunk	2.7	3.4	−0.3
242.3	Buried Cable			
	Subscriber	3.8	4.6	0.2
	Trunk	3.5	3.8	0.1
242.4	Submarine Cable	2.1	6.8	0.2
243	Aerial Wire	17.4		
244	Underground Conduit			
	Main	1.2	1.5	0.2
	Subsidiary	1.8	2.2	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	4.9	12.8	−0.1
	Computers	9.9	13.7	−0.9
264	Vehicles & Other Work Equipment			
	Motor Vehicles	11.0	13.7	−1.0
	Other Work Equipment	9.6	18.2	−1.1

* Effective June 1, 1983.

Effective January 1, 1984.

FDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - IOWA

Acct. No.	*Class or Subclass of Plant*	*Investment Recovery* *SLVG Rate** *(%)*	*SLELG Rate#* *(%)*	*Net Salvage Rate** *(%)*
212	Buildings	2.2	4.3	0.0
221	Central Office Equipment			
	Manual	8.4		−2.8
	Step-by-Step	11.8		0.3
	Crossbar	17.3		0.1
	Non-Ded. Circuit	7.2	12.5	−0.2
	DDS Circuit	8.7	13.9	0.1
	Radio	6.5	9.3	0.5
	Electronic	5.8	8.6	−0.3
231	Station Apparatus			
	Teletypewriter	16.8	1.0	
	Telephone & Miscellaneous	12.7		0.4
	Radio	0.0		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	15.3		−3.3
	Other	45.2		0.6
	DDS	14.5		−0.3
241	Pole Lines	15.6	24.1	10.7
242.1	Aerial Cable			
	Exchange	6.8	12.9	1.4
	Toll	0.0	19.8	19.6
242.2	Underground Cable			
	Exchange	3.7	4.9	−0.2
	Toll	3.5	14.2	−1.8
242.3	Buried Cable			
	Exchange	3.7	4.7	0.3
	Toll	4.0	4.7	0.3
242.4	Submarine Cable	2.4	4.0	0.0
243	Aerial Wire			
	Exchange[1]			
	Toll[1]			
244	Underground Conduit	1.7	1.7	0.1
261	Furniture & Office Equipment			
	Furniture & Mech. Appliances	5.5	8.6	−0.1
	Computer Systems	13.4	16.7	−0.4
264	Vehicles & Other Work Equipment			
	Motor Vehicles	13.7	14.3	−3.1
	Other Work Equipment	6.6	10.4	−0.4

* Effective January 1, 1984.

# Effective January 1, 1984 except Account Numbers 221, 261 and 264 which are effective January 1, 1983.

[1] The January 1, 1983 net book cost less the future net salvage estimate of −26.4% is to be amortized in equal amounts over a 5 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY MINNESOTA

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate** (%)	*Recovery SLELG Rate#* (%)	*Net Salvage Rate** (%)
212	Buildings	2.3	3.4	0.0
221	Central Office Equipment			
	Manual	30.6		6.1
	Step-by-Step	12.8		−0.6
	Crossbar	14.4		0.4
	Non-Ded. Circuit	7.3	12.8	0.0
	DDS Circuit	9.1	13.9	0.3
	Radio	6.2	9.3	0.2
	Electronic	5.6	8.6	−0.3
231	Station Apparatus			
	Teletypwriter	12.8		0.8
	Telephone & Miscellaneous	12.4		0.3
	Radio	10.7		−0.6
232	Station Connection - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	15.6		−2.3
	Other	63.1		2.0
	DDS	14.1		−0.3
241	Pole Lines	11.6	24.9	8.9
242.1	Aerial Cable			
	Exchange	6.3	11.4	0.8
	Toll	21.5	42.8	9.8
242.2	Underground Cable			
	Exchange	3.7	5.0	−0.3
	Toll	3.7	14.4	−0.7
242.3	Buried Cable			
	Exchange	3.8	4.7	0.1
	Toll	4.0	4.7	0.3
242.4	Submarine Cable	2.7	4.0	0.0
243	Aerial Wire			
	Exchange[1]			
	Toll[1]			
244	Underground Conduit	1.7	1.7	0.1
261	Furniture & Office Equipment			
	Furniture & Mech. Appliances	5.6	8.8	−0.2
	Computer Systems	15.0	16.7	−0.6
264	Vehicles & Other Work Equipment			
	Motor Vehicles	13.2	15.4	−2.0
	Other Work Equipment	7.0	10.4	−0.3

* Effective November 1, 1983.

# Effective January 1, 1984.

[1] The January 1, 1983 net book cost less the future net salvage estimate of −47% is to be amortized in equal amounts over a 5 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for NORTHWESTERN BELL TELEPHONE COMPANY - NEBRASKA

Effective January 1, 1984

Acct. No. (%)	*Class or Subclass of Plant* (%)	*Investment Recovery SLVG Rate* (%)	*Investment Recovery SLELG Rate*	*Net Salvage Rate*
212	Buildings	2.2	2.6	0.0
221	Central Office Equipment			
	Manual	7.6		−5.9
	Step-by-Step	12.5		0.1
	Crossbar	21.2		0.7
	Non-Ded. Circuit	7.4	12.8	−0.1
	DDS Circuit	8.7	13.9	−0.2
	Radio	6.9	9.3	0.3
	Electronic	5.7	8.6	−0.3
231	Station Apparatus			
	Teletypewriter	15.7		0.4
	Telephone & Miscellaneous	11.6		0.3
	Radio	13.1		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	14.8		−2.6
	Other	24.7		0.0
	DDS	14.1		−0.2
241	Pole Lines	24.7	22.2	13.1
242.1	Aerial Cable			
	Exchange	6.6	11.4	1.6
	Toll[1]			
242.2	Underground Cable			
	Exchange	3.7	4.9	0.3
	Toll	3.8	14.3	0.3
242.3	Buried Cable	3.8	14.3	0.3
	Exchange	3.9	4.7	0.3
	Toll	4.0	4.7	0.3
242.4	Submarine Cable	2.5	3.8	0.0
243	Aerial Wire			
	Exchange[2]			
	Toll[2]			
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Furniture & Mech. Appliances	5.5	8.8	−0.2
	Computer Systems	15.1	16.7	−0.4
264	Vehicles & Other Work Equipment			
	Motor Vehicles	10.5	14.3	−1.7
	Other Work Equipment	8.8	9.7	−1.5

[1] The January 1, 1983 net book cost less the future net salvage estimate of 51% is to be amortized in equal amounts over a 2 year period.

[2] The January 1, 1983 net book cost less the future net salvage estimate of −59% is to be amortized in equal amounts over a 7 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - NORTH DAKOTA

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Investment Recovery SLVG Rate* (%)	*SLELG Rate* (%)	*Net Salvage Rate* (%)
212	Buildings	2.6	3.6	0.0
221	Central Office Equipment			
	Manual	0.0		22.2
	Step-by-Step	12.0		−0.4
	Crossbar	17.5		0.8
	Non-Deb. Circuit	7.4	12.8	−0.1
	Radio	5.0	9.3	0.2
	Electronic	5.2	8.6	−0.1
231	Station Apparatus			
	Teletypewriter	17.6		0.9
	Telephone & Miscellaneous	10.5		−1.0
	Radio	8.8		−0.5
232	Staton Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	14.0		−2.2
	Other	12.6		−0.2
241	Pole Lines	28.0	25.5	15.4
242.1	Aerial Cable			
	Exchange	6.9	12.0	2.1
	Toll[1]			
242.2	Underground Cable			
	Exchange	3.6	4.9	1.1
	Toll	3.7	14.9	0.3
242.3	Buried Cable			
	Exchange	3.9	4.9	0.3
	Toll	3.9	5.0	0.3
242.4	Submarine Cable	2.8	3.9	0.0
243	Aerial Wire			
	Exchange[2]			
	Toll[2]			
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Furniture & Mech. Appliances	5.8	8.5	−0.1
	Computer Systems	14.2	16.7	0.1
264	Vehicles & Other Work Equipment			
	Motor Vehicles	12.4	14.7	−2.5
	Other Work Equipment	6.5	9.7	−0.4

[1] The January 1, 1983 net book cost less the future net salvage estimate of −38% is to be amortized in equal amounts over a 2 year period.

[2] The January 1, 1983 net book cost less the future net salvage estimate of −36% is to be amortized in equal amounts over a 7 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NORTHWESTERN BELL TELEPHONE COMPANY - SOUTH DAKOTA

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate (%)*	*Recovery SLELG Rate (%)*	*Net Salvage Rate (%)*
212	Buildings	2.9	4.2	0.0
221	Central Office Equipment			
	Manual[1]			
	Step-by-Step	10.7		−0.2
	Crossbar	14.5		0.1
	Non-Ded. Circuit	7.0	12.5	0.1
	DDS Circuit		13.9	0.1
	Radio	5.7	9.0	0.2
	Electronic	5.4	8.2	−0.2
231	Station Apparatus			
	Teletypewriter	23.0		−0.7
	Telephone & Miscellaneous	11.7		0.9
	Radio	0.0		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	12.0		0.9
	Other	11.3		−0.8
241	Pole Lines	20.9	21.1	13.4
242.1	Aerial Cable			
	Exchange	6.9	13.6	1.2
	Toll[2]			
242.2	Underground Cable			
	Exchange	3.4	4.9	0.4
	Toll	3.3	13.6	−0.4
242.3	Buried Cable			
	Exchange	3.9	5.0	0.3
	Toll	3.9	5.0	0.3
242.4	Submarine Cable	3.2	4.0	0.0
243	Aerial Wire			
	Exchange[3]			
	Toll[3]			
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Furniture & Mech. Appliances	5.8	9.2	−0.2
	Computer Systems	17.7	16.7	−0.4
264	Vehicles & Other Work Equipment			
	Motor Vehicles	12.6	16.1	−2.6
	Other Work Equipment	6.7	10.4	−1.1

[1] The January 1, 1983 net book cost less the future net salvage estimate of −19% is to be amortized in equal amounts over a 3 year period.

[2] The January 1, 1983 net book cost less the future net salvage estimate of −36% is to be amortized in equal amounts over a 3 year period.

[3] The January 1, 1983 net book cost less the future net salvage estimate of −43% is to be amortized in equal amounts over an 8 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE OHIO BELL TELEPHONE COMPANY

Acct. No.	*Class or Subclass of Plant*	*Investment Recovery SLVG Rate* (%)*	*Investment Recovery SLELG Rate# (%)*	*Net Salvage Rate* (%)*
212	Buildings	2.6	4.0	−0.2
221	Central Office Equipment			
	Manual	16.4		5.1
	Step-by-Step	14.3		2.0
	Crossbar	16.6		1.0
	Non-Deb. Circuit	8.1	15.2	−0.2
	DDS Circuit	7.8	14.3	0.0
	Radio	5.4	16.1	−0.4
	Electronic	5.6	8.6	−0.3
231	Station Apparatus			
	Teletypewriter	11.3		0.1
	Telephone & Miscellaneous	13.7		0.1
	Radio	16.2		−1.5
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	14.7		−1.5
	Other	29.9		2.5
	DDS	16.0		−0.2
241	Pole Lines	3.1	8.3	2.0
242.1	Aerial Cable			
	Exchange	4.7	5.9	0.5
	Toll	5.3	12.1	−5.3
242.2	Underground Cable			
	Exchange	3.3	5.7	−0.5
	Toll	2.7	7.3	−2.3
242.3	Buried Cable			
	Exchange	3.2	5.1	0.2
	Toll	2.1	3.9	0.2
242.4	Submarine Cable			
	Exchange	1.8	4.1	1.9
	Toll	3.5	4.1	1.8
243	Aerial Wire	15.1		14.7
244	Underground Conduit	1.4	1.5	0.1
261	Furniture & Office Equipment	3.7	8.8	0.0
	Computer & AMA Systems	11.6	15.2	−0.9
264	Vehicles & Other Work Equipment			
	Motor Vehicles	12.9	14.7	−3.9
	Tools	7.0	16.9	−0.8

* Effective December 1, 1983 except Account Numbers 231 and 234 which are effective January 1, 1984.

Effective January 1, 1983.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - FLORIDA

Acct. No.	*Class or Subclass of Plant*	*Investment* *SLVG Rate** *(%)*	*Recovery* *SLELG Rate#* *(%)*	*Net Salvage Rate** *(%)*
212	Buildings	2.3		−0.1
221	Central Office Equipment			
	Manual[1]			
	Step-by-Step	39.8		5.9
	Crossbar	23.0		0.6
	Non-Deb. Circuit	7.2	13.5	−0.4
	DDS Circuit	8.4	18.2	−0.5
	Radio	7.3	10.2	0.8
	Electronic	5.7	8.6	−0.4
231	Station Apparatus			
	Teletypewriter	12.3		−0.1
	Telephone & Miscellaneous	12.4		−0.4
	Radio	18.0		−0.4
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	12.5		−0.9
	Other	27.3		1.8
	DDS	16.8		−0.3
241	Pole Lines	3.2	8.0	2.3
242.1	Aerial Cable			
	Exchange	5.3	11.0	1.8
	Toll	9.0	10.2	−1.4
242.2	Underground Cable			
	Exchange	3.5	5.8	−0.2
	Toll	5.9	7.7	−0.5
242.3	Buried Cable			
	Exchange	4.3	6.5	0.3
	Toll	6.8	7.7	0.2
242.4	Submarine Cable	3.4	7.3	0.1
243	Aerial Wire	48.6		11.2
244	Underground Conduit	1.5	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Regular	6.6	8.3	−0.2
	Computers	14.8	18.9	0.3
264	Vehicles & Other Work Equipment			
	Motor Vehicles	11.8	13.0	−2.6
	Other Work Equipment	6.7	15.9	−0.2

* Effective March 1, 1983.

Effective January 1, 1983.

[1] The January 1, 1983 net book cost less the future net salvage estimate of −8% is to be amortized in equal amounts over a 4.4 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - GEORGIA

		Investment Recovery		*Net*
Acct. No.	*Class or Subclass of Plant*	*SLVG Rate** (%)	*SLELG Rate#* (%)	*Salvage Rate** (%)
212	Buildings	2.6		−0.1
221	Central Office Equipment			
	Manual[1]			
	Step-by-Step	40.9		3.2
	Crossbar	19.5		0.9
	Non-Deb. Circuit	8.0	11.1	−0.4
	DDS Circuit	8.1	15.2	−0.2
	Radio	6.2	14.5	0.2
	Electronic	5.4	8.6	−0.3
231	Station Apparatus			
	Teletypewriter	9.7		0.3
	Telephone & Miscellaneous	13.0		0.0
	Radio	25.2		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	13.4		−1.4
	Other	26.2		0.0
	DDS	17.6		−3.3
241	Pole Lines	4.0	11.1	2.3
242.1	Aerial Cable			
	Exchange	5.4	8.2	1.2
	Toll	7.5	10.1	−1.2
242.2	Underground Cable			
	Exchange	3.5	6.0	−0.4
	Toll	6.1	9.7	−1.9
242.3	Buried Cable			
	Exchange	4.3	5.7	0.2
	Toll	5.1	10.0	0.2
242.4	Submarine Cable	3.3	7.2	0.0
243	Aerial Wire	10.5		4.3
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Regular	6.0	10.5	−1.0
	Computers	14.6	18.5	0.5
264	Vehicles & Other Work Equipment			
	Motor Vehicles	13.2	14.1	−4.5
	Other Work Equipment	6.1	18.5	−0.3
	Aircraft	10.0		−6.0

* Effective March 1, 1983.
# Effective January 1, 1983.

[1] The January 1, 1983 net book cost less the future net salvage estimate of −7% is to be amortized in equal amounts over a 3.7 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - NORTH CAROLINA

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate** (%)	*Recovery SLELG Rate#* (%)	*Net Salvage Rate** (%)
212	Buildings	2.5		−0.1
221	Central Office Equipment			
	Step-by-Step	17.6		0.3
	Crossbar	15.5		−0.3
	Non-Deb. Circuit	8.7	11.5	−0.3
	DDS Circuit	8.6	15.4	−0.4
	Radio	5.6	14.5	0.9
	Electronic	5.6	8.6	−0.2
231	Station Apparatus			
	Teletypewriter	11.1		0.1
	Telephone & Miscellaneous	9.1		0.0
	Radio	0.1		−0.1
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	12.3		−1.2
	Other	22.1		0.3
	DDS	22.3		−4.7
241	Pole Lines	3.8	10.6	1.8
242.1	Aerial Cable			
	Exchange	5.5	7.1	0.5
	Toll	7.1	10.9	−7.3
242.2	Underground Cable			
	Exchange	3.5	5.1	−0.5
	Toll	5.9	6.1	−1.0
242.3	Buried Cable			
	Exchange	4.4	5.6	0.2
	Toll	5.9	6.3	−0.4
242.4	Submarine Cable	2.7	7.2	0.2
243	Aerial Wire	17.8		8.0
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Regular	4.4	8.3	−0.1
	Computers	13.6	18.9	0.4
264	Vehicles & Other Work Equipment			
	Motor Vehicles	11.0	13.2	−1.3
	Other Work Equipment	6.4	19.6	−1.0

*Effective March 1, 1983.
Effective January 1, 1983.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - SOUTH CAROLINA

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate** (%)	*Recovery SLELG Rate#* (%)	*Net Salvage Rate** (%)
212	Buildings	2.5		−0.1
221	Central Office Equipment			
	Step-by-Step	12.5		0.6
	Crossbar	14.6		−0.2
	Non-Deb. Circuit	7.6	12.5	−0.2
	DDS Circuit	8.7	14.3	−0.4
	Radio	7.7	17.5	0.7
	Electronic	5.4	8.6	−0.3
231	Station Apparatus			
	Teletypewriter	11.4		0.1
	Telephone & Miscellaneous	11.1		−0.3
	Radio	4.1		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	12.0		−1.2
	Other	24.7		0.6
	DDS	17.1		−1.8
241	Pole Lines	4.0	10.8	2.1
242.1	Aerial Cable			
	Exchange	5.9	7.6	0.4
	Toll	3.0	9.9	−3.1
242.2	Underground Cable			
	Exchange	3.6	4.9	−0.3
	Toll	6.1	7.8	−1.7
242.3	Buried Cable			
	Exchange	4.5	5.0	0.2
	Toll	5.5	9.8	0.3
242.4	Submarine Cable	3.8	7.2	0.0
243	Aerial Wire	21.6		6.7
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Regular	5.2	7.8	−0.2
	Computers	12.5	18.2	0.6
264	Vehicles & Other Work Equipment			
	Motor Vehicles	10.0	13.9	−2.2
	Other Work Equipment	5.9	17.2	−0.3

* Effective March 1, 1983.
# Effective January 1, 1983.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY - ARKANSAS

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Investment Recovery*		*Net Salvage Rate (%)*
		SLVG Rate (%)	*SLELG Rate (%)*	
212	Buildings	2.2	3.3	−0.1
221	Central Office Equipment			
	Manual	12.9		1.0
	Step-by-Step	27.8		0.2
	Crossbar	19.9		0.9
	Non-Deb. Circuit	10.4	14.7	−0.6
	DDS Circuit	10.6	25.0	−3.0
	Radio	5.7	10.9	0.1
	Analog Eletronic	5.7	8.2	−0.3
	Digital Electronic	4.5	6.7	0.0
231	Station Apparatus			
	Teletypewriter	18.9		−0.5
	Telephone & Miscellaneous	13.1		–
	Radio	0.7		–
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	14.5		–
	Other	33.7		–
	DDS	17.8		–
241	Pole Lines	4.4	9.7	2.8
242.1	Aerial Cable			
	Exchange	5.6	9.7	1.4
	Toll	12.0	29.1	−2.3
242.2	Underground Cable			
	Exchange	3.5	6.7	−0.2
	Toll	4.2	6.2	−0.9
242.3	Buried Cable			
	Exchange	4.3	7.0	0.3
	Toll	4.6	5.0	−0.2
242.4	Submarine Cable	4.1	5.9	0.1
243	Aerial Wire			
	Exchange	21.0		12.3
	Toll[1]			
244	Underground Conduit	1.8	1.9	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	6.2	8.4	−0.1
	Computers AMA Systems	12.3	22.7	−3.8
264	Vehicles & Other Work Equipment			
	Passenger & Delivery Cars	12.7	13.3	−1.8
	Trucks	11.9	13.7	−1.8
	Other Work Equipment	6.5	14.7	0.0

[1] The January 1, 1983 negative depreciation reserve is to be amortized in-equal amounts over a 5 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE COMPANY - KANSAS

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate (%)*	*Recovery SLELG Rate (%)*	*Net Salvage Rate (%)*
212	Buildings	2.4	3.6	−0.1
221	Central Office Equipment			
	Manual	31.1		7.5
	Step-by-Step	12.5		1.2
	Crossbar	13.3		0.8
	Non-Deb. Circuit	7.5	20.8	−0.3
	DDS Circuit	8.3	25.0	−1.7
	Radio	6.8	12.3	0.4
	Analog Eletronic	5.5	8.2	−0.3
	Digital Electronic	4.9	7.5	−0.1
231	Station Apparatus			
	Teletypewriter	21.3		−0.3
	Telephone & Miscellaneous	10.4		–
	Radio	5.5		–
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	15.1		–
	Other	34.5		–
	DDS	18.2		–
241	Pole Lines	7.0	18.8	4.4
242.1	Aerial Cable			
	Exchange	5.6	9.3	0.1
	Toll	43.5	64.6	−14.6
242.2	Underground Cable			
	Exchange	2.9	5.9	1.3
	Toll	4.8	5.9	−1.9
242.3	Buried Cable			
	Exchange	4.1	5.0	0.6
	Toll	4.4	4.9	−0.2
242.4	Submarine Cable	4.6		0.1
243	Aerial Wire			
	Exchange	19.3		1.7
	Toll[1]			
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	4.2	6.5	−0.3
	Computers & AMA Systems	14.4	22.7	1.8
264	Vehicles & Other Work Equipment			
	Passenger & Delivery Cars	14.0	13.3	−1.6
	Trucks	11.2	11.4	−1.1
	Other Work Equipment	6.3	15.4	0.0

[1] The January 1, 1983 net book cost less the future net salvage estimate of 0% is to be amortized in equal amounts over a 3 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE COMPANY - MISSOURI

Effective January 1, 1984

		Investment Recovery		*Net*
Acct. No.	*Class or Subclass of Plant*	*SLVG Rate* (%)	*SLELG Rate* (%)	*Salvage Rate* (%)
212	Buildings	2.3	3.4	−0.1
221	Central Office Equipment			
	Manual	46.8		3.5
	Step-by-Step	10.3		0.8
	Crossbar	19.7		1.4
	Non-Deb. Circuit	7.6	19.6	−0.3
	DDS Circuit	8.9	23.8	−0.5
	Radio	5.2	13.5	0.3
	Analog Eletronic	5.8	8.2	−0.3
	Digital Electronic	5.2	7.5	−0.1
231	Station Apparatus			
	Teletypewriter	28.8		−1.0
	Telephone & Miscellaneous	12.7		–
	Radio	16.4		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	15.8		–
	Other	48.4		2.1
	DDS	18.9		–
241	Pole Lines	4.2	10.4	2.4
242.1	Aerial Cable			
	Exchange	3.4	5.0	0.7
	Toll	10.2	24.1	0.2
242.2	Underground Cable			
	Exchange	3.0	6.2	0.4
	Toll	3.5	6.2	−1.3
242.3	Buried Cable			
	Exchange	3.8	4.7	0.2
	Toll	4.7	5.1	−0.2
242.4	Submarine Cable	4.2	6.9	0.1
243	Aerial Wire			
	Exchange	12.1		8.2
	Toll[1]			
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	4.6	17.5	−0.1
	Computers & AMA Systems	12.4	21.7	−3.4
264	Vehicles & Other Work Equipment			
	Passenger & Delivery Cars	14.1	13.9	−1.5
	Trucks	10.9	12.8	−0.5
	Aircraft	6.5		−0.5
	Other Work Equipment	6.9	16.4	−0.2

[1] The January 1, 1983 net book cost less the future net salvage estimate of 4% is to be amortized in equal amounts over a 1.1 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE COMPANY - OKLAHOMA

Effective January 1, 1984

		Investment Recovery		*Net*
Acct. No.	*Class or Subclass of Plant*	*SLVG Rate* (%)	*SLELG Rate* (%)	*Salvage Rate* (%)
212	Buildings	2.4	3.6	−0.1
221	Central Office Equipment			
	Manual	28.8		4.5
	Step-by-Step	12.8		1.0
	Crossbar	15.4		0.1
	Non-Deb. Circuit	6.6	14.5	−0.2
	DDS Circuit	7.9	17.9	−0.9
	Radio	5.7	8.9	0.2
	Analog Eletronic	5.4	8.2	−0.3
	Digital Electronic	5.0	7.5	−0.1
231	Station Apparatus			
	Teletypewriter	22.4		−0.8
	Telephone & Miscellaneous	10.5		–
	Radio	19.7		0.0
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	14.8		–
	Other	15.2		1.8
	DDS	17.4		–
241	Pole Lines	4.9	13.1	3.8
242.1	Aerial Cable			
	Exchange	3.9	6.5	0.9
	Toll	20.6	22.1	0.5
242.2	Underground Cable			
	Exchange	2.5	8.0	0.3
	Toll	4.0	6.2	−1.4
242.3	Buried Cable			
	Exchange	4.4	4.7	0.5
	Toll	4.3	5.0	−0.2
242.4	Submarine Cable	5.0	7.1	0.0
243	Aerial Wire			
	Exchange	13.0		9.9
	Toll[1]			
244	Underground Conduit	1.5	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	4.4	8.5	−0.4
	Computers & AMA Systems	17.4	21.7	−4.3
264	Vehicles & Other Work Equipment			
	Passenger & Delivery Cars	10.6	11.8	−1.3
	Trucks	5.3	10.8	−1.1
	Other Work Equipment	7.7	16.4	−0.1

[1] The January 1, 1983 net book cost less the future net salvage estimate of 3% is to be amortized in equal amounts over a 1 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN BELL TELEPHONE COMPANY - TEXAS

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate (%)*	*Recovery SLELG Rate (%)*	*Net Salvage Rate (%)*
212	Buildings	2.3	3.3	−0.1
221	Central Office Equipment			
	Manual	48.5		5.1
	Step-by-Step	17.2		2.3
	Crossbar	15.7		1.2
	Non-Deb. Circuit	6.2	17.2	−0.1
	DDS Circuit	8.0	20.4	−0.2
	Radio	5.8	8.3	0.3
	Analog Eletronic	5.5	8.2	−0.2
	Digital Electronic	4.4	6.7	0.0
231	Station Apparatus			
	Teletypewriter	20.3		−0.1
	Telephone & Miscellaneous	12.5		–
	Radio	16.8		−0.2
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Electronic	15.4		–
	Other	18.6		1.1
	DDS	18.2		–
241	Pole Lines	3.5	8.3	3.2
242.1	Aerial Cable			
	Exchange	4.0	5.8	1.5
	Toll	9.5	22.2	−0.4
242.2	Underground Cable			
	Exchange	3.0	5.3	0.2
	Toll	4.1	5.8	−0.3
242.3	Buried Cable			
	Exchange	3.8	4.7	0.4
	Toll	4.5	5.0	−0.2
242.4	Submarine Cable	4.6	4.9	0.1
243	Aerial Wire			
	Exchange	11.7		10.8
	Toll[1]			
244	Underground Conduit	1.6	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	4.6	11.0	−0.2
	Computers & AMA Systems	13.9	22.7	−2.7
264	Vehicles & Other Work Equipment			
	Passenger & Delivery Cars	10.7	11.5	−1.1
	Trucks	10.2	11.2	−0.6
	Other Work Equipment	8.2	17.5	−0.3

[1] The January 1, 1983 net book cost less the future net salvage estimate of 1% is to be amortized in equal amounts over a 1 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
WISCONSIN TELEPHONE COMPANY

Acct. No.	*Class or Subclass of Plant*	*Investment SLVG Rate (%)*	*Recovery SLELG Rate (%)*	*Net Salvage Rate (%)*
212	Buildings	2.3	3.0	0.0
221	Central Office Equipment			
	Manual	0.0		1.2
	Step-by-Step	30.1		3.3
	Crossbar	30.1		0.4
	Non-Deb. Circuit	7.5	15.4	−0.3
	DDS Circuit	8.4	10.9	0.0
	Radio	5.6	9.6	−0.7
	Eletronic	5.7	8.2	−0.5
231	Station Apparatus			
	Teletypewriter	15.3		−0.6
	Telephone & Miscellaneous	13.7		0.0
	Radio	7.3		−0.4
232	Station Connections - Other	5.0		
234	Large Private Branch Exchanges			
	Other	48.1		1.4
	Electronic	16.0	−0.9	
	DDS	20.1		−5.2
241	Pole Lines	3.5	10.4	1.3
242.1	Aerial Cable			
	Exchange	5.4	8.2	0.2
	Toll	2.1	9.2	−2.1
242.2	Underground Cable			
	Exchange	3.0	5.7	−0.2
	Toll	2.3	6.8	−2.1
242.3	Buried Cable			
	Exchange	4.0	5.0	0.1
	Toll	4.1	5.0	−0.1
242.4	Submarine Cable	3.9	7.0	0.1
243	Aerial Wire			
	Exchange	55.4		14.7
244	Underground Conduit	1.5	1.7	0.1
261	Furniture & Office Equipment			
	Storeroom & Other	5.7	6.9	−0.7
	Computers AMA Systems	14.7	14.7	−0.9
264	Vehicles & Other Work Equipment			
	Motor Vehicles	12.4	14.9	−1.3
	Other Work Equipment	5.9	18.5	−0.1

* Effective June 1, 1983.
# Effective January 1, 1984.

FCC 83-588

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for:

General Telephone Company of the Southeast

General Telephone Company of the Southwest

ORDER

(Adopted: December 14, 1983; Released: December 20, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *Introduction*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of these classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe revised percentages of depreciation (depreciation rates) for the two GTE companies listed in the caption using both the straight-line vintage group remaining-life (remaining-life) and straight-line equal life group (SLELG) methods.

II. *Background*

A. *Remaining-Life Method*

2. Prior to 1981, we had only used the straight-line vintage group whole-life (whole-life) depreciation method in prescribing depreciation rates for telephone company plant. Using this method, we determined the depreciation accruals applicable to each year's operations using current estimates of life and net salvage. As estimates of life and net salvage changed over time, the whole-life rates were changed in accordance with the changing estimates. However, using whole-life concepts, no attempt was made to adjust the rates to allow for reserve surpluses or deficits resulting from the

cumulative over- or under-estimation of life and net salvage factors. This changed with our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), where we revised Part 31 of the Rules and Regulations, the "Uniform System of Accounts for Class A and B Telephone Companies," to allow the use of the remaining-life depreciation method. The remaining-life method is designed to distribute the unrecovered cost (original cost less the sum of the depreciation reserve and future net salvage) of a group of assets over its life expectancy. Inherent in this method is an allocation of any reserve deficit or surplus over the estimated average remaining life.

3. We directed the staff to phase in the implementation of remaining-life depreciation rates in conjunction with the normal triennial represcription cycle. Implementation began with those companies that were scheduled for review in 1981. Those companies submitted studies supporting revised depreciation rates using the remaining-life method. After a complete review, we adopted remaining-life depreciation rates for those companies in January 1982. *See Depreciation Rates*, 88 FCC 2d 1354 (1982). Following the same procedure, we continued implementation with the adoption in December 1982 of remaining-life rates for those companies that were regularly scheduled for depreciation review in 1982. *See Depreciation Rates*, 92 FCC 2d 978 (1982). Remaining-life rates for the remainder of the companies were reviewed in detail this year. Our findings and conclusions regarding these rates are discussed beginning in paragraph 12. Our adoption of the composite remaining-life rates listed in the Appendix to this order marks the completion of the phase-in of the remaining-life method for all of the GTE companies.

B. *Straight-Line Equal-Life Group Method*

4. In Docket No. 20188, we also amended our rules to permit the use of the SLELG depreciation method for new additions to plant as an alternative to the straight-line vintage group (SLVG) method, provided that adequate data is available for the proper application of the method. The primary differences between the SLELG and SLVG methods lie in the definition of the basic depreciation groups and in the approach each takes in spreading the original cost of the assets comprising the basic groups over their estimated average service lives. While SLVG forms its basic groups by combining all units placed in service in one year (i.e., a vintage group), SLELG creates its basic groups by combining all units within each vintage group which share an equal life expectancy (i.e., an equal-life group). While the SLVG method is designed to depreciate 100% of the original cost of a vintage, on average, over the life cycle of each vintage, the SLELG method is designed to depreciate 100% of the original cost of each equal life group over its life. If projections are accurate, the SLELG method should allow for depreciation at a rate more representative

of the actual consumption of units of property than SLVG. We concluded in Docket No. 20188 that the proper application and monitoring of this method would not only enhance the companies' cash flow and present a more accurate and objective financial picture of the companies' operations and capital requirements, but would also benefit their customers by encouraging innovation and the introduction of new technology.

5. Under both the SLVG and SLELG methods, retirement projections, service life estimates, and depreciation rates are normally determined, in part, through the use of survivor curves. These survivor curves define the relationship between the age of plant investment and the relative percentage expected to remain in service. Under the SLELG methodology, the survivor curves assume an added significance—that of defining the basic (equal-life) groups. Under the SLVG method, most survivor curves are selected only after the staff has completed detailed statistical analysis of historical retirement data. With the added significance of the survivor curves in the SLELG method, the availability and analysis of historical retirement data as the starting point of service life analysis remains as important as ever. The added significance of the survivor curves also accentuates the need for improvements in the estimation of the technical and economic forces driving the addition and retirement of telecommunications property.

6. We recognized the importance of adequate data in our *Report and Order* in Docket No. 20188 where we found that the SLELG method is acceptable, provided that it is assured that adequate data is available for proper application of the method; that record keeping and reporting practices will enable monitoring of the reasonableness of the rate of allocation of both original cost and provisions for salvage and removal; and that such allocation of original cost will achieve allocation over the service life of the property neither more nor less than 100% of the investment net of salvage value.[1] Accordingly, we directed the staff to take such measures as may be necessary to ensure the measurability and accountability of the results under the SLELG method.

7. We directed the staff to phase in the implementation of SLELG depreciation rates beginning with the outside plant accounts, followed by the central office equipment accounts, and concluding with all other plant accounts. Implementation began with those companies scheduled for review in 1981. After a thorough review, we adopted SLELG rates for the outside plant accounts of these companies in January 1982. *See Depreciation Rates*, 88 FCC 2d 1567 (1982). The staff then reviewed SLELG proposals for the outside plant accounts of the remainder of the GTE companies and for the central office equipment accounts of all GTE companies. We

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[1] *Property Depreciation*, 83 FCC 2d at 283.

prescribed rates for these accounts in orders of July and December 1982. *See Depreciation Rates*, 90 FCC 2d 997 (1982); 92 FCC 2d 920; and 92 FCC 2d 712 (1982).

8. This year the staff reviewed SLELG rates for the buildings and general equipment accounts of those companies listed in the caption which were scheduled for regular review in 1983. We are separately considering SLELG rates for the remainder of the GTE companies that have requested such treatment in the other depreciation order before us today. Our adoption of these orders marks the completion of the phase-in of the SLELG method for the GTE companies that have requested such treatment.

C. *Review Procedures*

9. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a company only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the company's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the company's filings and the preliminary FCC staff proposals at a conference in which representatives of the company, the staffs of the respective state commission(s), and the FCC staff participate (i.e., a three-way meeting).

10. The two GTE companies for which rates are under consideration submitted studies proposing new depreciation rates based upon revised life and salvage estimates. These studies were reviewed in detail by the FCC staff, which then prepared its own preliminary life, net salvage, and rate proposals and forwarded them to the companies and the state commissions. Some of the state commissions prepared similar studies and recommendations. Three-way meetings were then held at which the life, net salvage, and depreciation rate proposals of all three parties were thoroughly discussed.

11. After completing its analysis and arriving at recommendations, the FCC staff issued a Public Notice on September 2, 1983, entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies-Notice of Opportunity for Comment." The staff transmitted to each company and state commission a copy of the September 2 Public Notice and schedules showing the proposed composite remaining-life depreciation rates.

III. *Discussion of Issues*

12. This is the third consecutive year in which we have addressed the general issues raised by our depreciation represcriptions. Accordingly, we do not here address in detail every issue raised by every commenter.[2] We focus instead on those issues that have not been raised previously and on those that affect the two GTE companies specifically, as opposed to depreciation rates generally.[3]

A. *Depreciation Methods*

13. In our decision in Docket No. 20188 we considered the arguments expressed by the parties for and against the use of the SLELG method and determined that, provided adequate data is available, SLELG rates should be used for new assets. In the discussion in the *Report and Order*, 83 FCC 2d at 267, we found that the use of SLELG comports with the mandate of Section 1 of the Communications Act, "to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and worldwide wire and radio communication service with adequate facilities at reasonable charges . . . " 47 U.S.C. §151. The SLELG method was adopted for new plant in order more closely to coordinate depreciation recovery with the retirement of plant. This was in part an attempt to prevent new reserve deficits or surpluses from occurring. We reaffirmed our decision to allow the use of the SLELG method in our *Order on Reconsideration* in Docket No. 20188, *supra*, as well as in five 1982 prescription orders. *See Depreciation Rates*, 88 FCC 2d 1354; 88 FCC 2d 1567; 88 FCC 2d 997; 92 FCC 2d 978; and 92 FCC 2d 712. Nevertheless, several states have again questioned whether the use of SLELG rates is warranted. Inasmuch as these states have not raised any new arguments or evidence

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[2] Comments were filed by American Telephone and Telegraph Co. (AT&T), ten telephone operating companies, twenty state regulatory commissions, and the National Association of Regulatory Utility Commissioners (NARUC). A copy of each of these comments and a staff-prepared summary of these comments are available for inspection in the Commission's Common Carrier Bureau offices. Although we do not specifically address each comment in this decision, we have carefully considered all the issues raised.

[3] For example, several state commissions continue to object to this Commission's preemption of state authority over depreciation rates. *See Amendment of Part 31*, 92 FCC 2d 864 (1982), *appeal pending sub nom. Virginia State Corporation Commission v. FCC*, Civ. No. 83–1136 (4th Cir. filed February 11, 1983). These commissions indicate that they have not approved the remaining-life or SLELG depreciation methods for their jurisdictions. This is not the proper forum to reargue the preemption issue, and the pendency of an appeal does not affect the enforceability of our decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, C.A. No. N83-855 (D. Md. April 7, 1983). The state commissions are required to use the depreciation rates prescribed here for state ratemaking purposes.

regarding the use of SLELG rates, we have no basis to reverse our decision on this matter. Our Rules, as amended in Docket No. 20188, clearly allow the use of SLELG for new investments for accounts in which adequate data is available to properly apply and monitor it. For virtually all accounts in which we are considering the prescription of SLELG rates, the companies have demonstrated their ability to provide adequate data. Consequently, we will allow its use.

14. In our decision in Docket No. 20188 we also directed the staff to undertake the review of remaining-life depreciation rates for embedded investment in all plant accounts. This method was adopted in an attempt to allocate existing reserve deficits over the remaining life of embedded plant not subject to SLELG treatment. We have reaffirmed this decision in two prescription orders. *See Depreciation Rates*, 88 FCC 2d 1354 and 92 FCC 2d 978. Nevertheless, several states have questioned the use of the remaining-life method on the grounds that it fails to match depreciation expenses with capital consumption by changing accrual rates to recover embedded reserve deficiencies. Our goal has been, and will continue to be, the distribution of the full cost of an asset in reasonable manner over its service life. We continue to support our decision to implement the remaining-life method, noting that the "true-up" of reserve imbalances over the remaining life of an account was the primary reason for our decision in Docket No. 20188.

15. Nevertheless, AT&T and the BOCs stated that they are faced with serious depreciation reserve deficiencies which require changes in both service lives and depreciation methods. They opposed the continued use of the remaining-life method for eliminating the reserve deficit on the grounds that this method shifts a major portion of the recovery far into the future. As a result, they proposed a change to what they refer to as the straight-line age-life (SLAL) method. This method is similar to that which we currently use with two exceptions: (1) SLAL employs the SLELG method for embedded plant; and (2) SLAL uses current theoretical reserve studies to allocate account-level reserves to each vintage and uses net plant weighting procedures based upon these allocated vintage reserves. The GTE companies also supported the use of the SLELG method for embedded plant and the use of net plant weighting procedures.

16. We rejected the first proposed exception in Docket No. 20188 in which we found that SLELG should be applied to new additions only for the following reasons: (1) the use of the SLELG method for embedded plant would require more calculations and more detailed recordkeeping and, thus, increase the workload of the FCC and state public utility staffs; (2) the use of SLVG remaining-life rates for embedded plant will assure the attainment of 100% capital recovery, the same result that would ensue from the use of SLELG, so it is not necessary to apply SLELG rates to embedded vintages of plant; (3) there is a lack of disaggregated reserve data for embedded plant,

which impedes the identification and correction of deficiencies arising from cumulative past errors; and (4) introduction of new methods in mid-stream would complicate already difficult problems.

17. We have reexamined this issue and determined that our original decision was proper and is, in fact, consistent with the views given by NARUC on page 99 of *Public Utility Depreciation Practices* (1968), in which it is stated:

> The introduction of proposals to shift from one basic method to another usually involves problems in achieving the required reserve level appropriate for the new method and in avoiding sudden large changes in the overall level of depreciation expenses. A plan which has been used to overcome both of these problems is to split the plant by vintage before and after the conversion date and start all later vintages under accruals determined by the new method while continuing the older vintages on the former plan.

18. The second proposed exception, i.e., the use of net plant weighting based upon vintage reserves derived from current theoretical reserve studies, is also inconsistent with our depreciation policies. In our *Supplemental Opinion and Order* in Docket No. 20188, *supra*, we found that it is inappropriate to allocate book reserves using current theoretical reserve studies. In that order we stated that such an allocation must be based upon the actual debits and credits that have occurred over time. Inasmuch as depreciation rates have not been set by vintage, we believe it is virtually impossible for vintage reserves to be derived for embedded plant. Thus, we believe that net plant weighting cannot adequately be carried out for embedded plant. This is not to say the use of net plant weighting is without merit. If vintage reserves can be maintained from the outset of a vintage, it may be a viable procedure. In fact, we believe it may be feasible to maintain vintage reserves for the SLELG vintages. If procedures are developed to do so, we will consider the use of net plant weighting for these assets in future prescriptions.

19. Another consideration regarding the selection of the proper method is the pattern of capital recovery that will result. Our staff has examined this matter and has determined that the use of the SLAL method would immediately raise depreciation rates for most of the BOCs by from two to three percent of their original costs. Nationwide, this amounts to approximately four billion dollars a year in increased depreciation expense. This large increase using the SLAL method would be followed by a rapid decrease in depreciation expense to less than that which would result from the use of existing methods by 1990. Most of the state commissions are opposed to this procedure, in part because it would introduce an unjustified volatility of depreciation expenses and, thus, overall rate levels. We agree that during a period in which significant reserve deficiencies exist, the use of the SLAL method would result in too much volatility in the capital recovery pattern and is unacceptable.

20. As an alternative to the adoption of the remaining-life and SLAL methods, several companies and state commissions proposed, as a general rule, the amortization of net book cost over a period other than the remaining-life for those accounts with serious reserve deficits. Neither the companies nor the state commissions provided convincing arguments that the remaining-life method is not adequate nor that their proposed amortization procedures are necessary. We considered the use of amortization to eliminate reserve deficits in Docket No. 20188, *supra*, but we rejected it in favor of the use of the remaining-life method. As stated in paragraph 14, we continue to support the use of the remaining-life method to "true-up" reserve imbalances.[4]

B. *Composite Rates*

21. Since our first SLELG prescription order in January 1982, we have prescribed separate SLELG rates for each new vintage of most accounts. Inasmuch as we have only dealt with a few vintages, this practice has not caused major administrative or monitoring problems; however, if we were to continue this practice, the administration of our depreciation prescription program would become much more complex. For example, by 1990 we would be prescribing ten rates for each of approximately thirty plant accounts for each jurisdiction. Primarily for this reason, in our *Report and Order* in Docket No. 82-513, 48 FR 5928 (2/9/83), we directed the staff to review the concept of composite rates for SLELG vintages. During the past year the staff has examined this idea and determined that the use of composite SLELG rates is not only feasible but would greatly simplify the administration of SLELG rates. Although Michigan Bell and Southern Bell filed comments in opposition to a composite rate plan, the GTE companies and other respondents agreed with the staff that the use of composite rates would ease the administration and monitoring of SLELG rates.

22. Most of the parties suggested that three separate rates should be prescribed for each account, one for the original cost of the SLELG vintages, one for the original cost of the SLVG vintages, and one for net salvage for the account as a whole. The GTE companies filed for and commented in support of the use of a single composite rate for each account for ease of administration. While we believe that we can adequately administer three rates for each account, we prefer the use of one composite rate as suggested by the GTE companies. Therefore, we will prescribe a single composite rate for each account as requested by the GTE companies. In addition, we

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[4] There are special circumstances, particularly during the transition from the whole-life to the remaining-life method, when the use of an amortization procedure may be a more practical solution than the use of the remaining-life method. Such circumstances and our proposed solutions are discussed beginning in paragraph 26.

direct the staff to evaluate this procedure and inform us if further changes or refinements are necessary.

23. All composite rates proposed herein are calculated using the gross plant weighting compositing procedure specified on page 173 of NARUC's *Public Utility Depreciation Practices* (1968). If this procedure is used, the accruals resulting from the application of an account's composite rate to its plant balance will equal the sum of the accruals resulting from the application of the vintage rates to the vintage plant balance.[5] Thus, the use of the proposed compositing procedure will have no appreciable revenue requirement impact.

C. *Annual Update of Composite Rates*

24. The use of single composite depreciation rates necessitates consideration of annual updates to keep these rates current. Numerous state commissions joined NARUC in urging that these updates should reflect changes due to plant additions and retirements without altering the agreed-upon service life and salvage estimates. We have already ordered optional updates for dying accounts of companies that were reviewed in 1982. *See Depreciation Rates*, 92 FCC 2d 978. We can find no reason not to extend this procedure to all accounts to assure that composite rates are kept as current as possible. (Indeed, the California Commission has long employed annual technical updates of remaining-life rates.)

D. *Life and Net Salvage Factors*

25. Three-way agreement on life and salvage factors was achieved for all accounts of the two GTE companies under consideration in this order. As a result, we concur in the life and salvage proposals of the staff as reflected in the composite rates in the Appendix to this order.

E. *Amortization and Dying Accounts*

26. In Docket No. 20188 we expressed our concern that depreciation rates be prescribed in a manner that would assure 100% capital recovery. Consistent with this policy, we revised our rules to allow for the use of the remaining-life and SLELG depreciation methods. In the two years since we first prescribed rates using these methods, there have been several instances in which plant balances approached or reached zero and the associated reserve balance was significantly positive or negative. Such occurrences were expected during the transition to the new methods because the prior whole-life method made no attempt to resolve reserve problems that had developed over a period of years. It should be noted that the causes of these imbalances have not necessarily been determined to be those envisioned in the portion of our Rules related to the disposition of

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[5] Using this procedure vintage-level factors are calculated, but not prescribed.

reserve problems (*See* 47 C.F.R. 31.02–83). A few state commissions commented that the resolution of such problems should be left to their discretion. Such a policy would clearly be inconsistent with our position on preemption of depreciation matters. As a result, we find this suggestion to be without merit. Nevertheless, we direct the staff actively to solicit state views on reserve problems and keep us informed if alternative treatments are indicated.

27. In the Public Notice the staff proposed four procedures designed to reduce the chance that a significant reserve deficit or surplus would occur for a dying account, and to provide a mechanism to eliminate the deficit or surplus which will inevitably arise at the demise of an account. These procedures are as follows:

> (1) When a zero plant balance occurs and there is a small reserve balance, charge or credit this balance to the depreciation expense account.
>
> (2) When a zero plant balance occurs and there is a material reserve balance, amortize the balance over a period to be determined by the Commission.
>
> (3) When a plant balance is small and a large reserve deficit exists, apply the depreciation rate to the net book cost instead of the original cost. This would avoid the necessity of prescribing extremely high rates and ease the administration of the depreciation process in the last few years of a dying account, yet have no significant impact on actual expense levels.
>
> (4) If in any month the prescribed annual accrual is such that the reserve balance would exceed the service value, the company would be required to reduce the accrual such that the reserve balance would not exceed the service value.

28. The first two procedures proposed by the staff cover situations in which there is a zero plant balance and a non-zero reserve balance. With no assets in service and, thus, with no remaining life, the remaining-life depreciation method clearly cannot resolve the reserve imbalance. We believe, as do most of the commenting parties, that the procedures proposed by the staff will adequately resolve the reserve imbalances. We offer the following to clarify the procedures to be employed.

29. For an account in which the plant balance is zero and the reserve balance is material, the company is required to file with this Commission a report which contains the amount of the reserve, a description of the conditions which created the reserve imbalance, and the company's proposed accounting treatment to resolve the imbalance. Unless otherwise stated or approved, we will consider any amount in excess of 1% of a carrier's annual depreciation expense in the jurisdiction in question to be material and, thus, to require filings. Among the accounting options we will consider are as follows: (1) booking the reserve amount as an extraordinary retirement (account 138) with an amortization of that amount through account 609 over a specified period; and (2) amortization of the reserve amount through depreciation expense (account 608). The filing must be made 90 days prior to the company's closing of its

annual books of account, and a copy is to be concurrently submitted to the state commission having jurisdiction. For an account in which the plant balance is zero and the reserve balance is not material, the company must charge or credit the amount of the reserve balance to account 608.

30. We believe that situations in which the plant balance drops to zero while the reserve balance is other than zero will occur in the future in a few accounts. However, we believe that instances in which the reserve balances are material should occur very infrequently, inasmuch as the remaining-life depreciation method we have adopted and our Rules regarding extraordinary retirements will allow for the timely recovery of these reserve deficiencies. We note that this year no such problems occurred for the two GTE companies under consideration. However, if such problems occur in the future they are to be resolved consistent with the policies discussed above.

31. The third procedure proposed by the staff is aimed at resolving reserve imbalances for those accounts with existing plant balances. Several parties argued that the staff's proposed procedure is counter to the Commission's Rules (*See* 47 C.F.R. 31.02–81(a)) which do not provide for the application of a depreciation rate to net plant and do not provide an account for net plant. Most commenting parties stated that the staff's proposal would be difficult to administer and would not allow for full capital recovery. Although we do not agree that the use of this procedure is inconsistent with our Rules, we do agree that the specific procedure proposed in the Public Notice may prove cumbersome and may not result in 100% capital recovery. However, we believe that if the staff's proposed procedure is modified as discussed below, it could be used to resolve such reserve problems in an effective manner.

32. In accounts with large reserve imbalances such that the application of the remaining-life depreciation method would result in extremely high depreciation rates (i.e., approaching or in excess of 100%), we direct the staff to determine a reasonable period over which the net book cost less estimated future net salvage can be amortized. The net book cost less future net salvage as of the study date should be divided by the amortization period to determine the equal annual amount to be charged to depreciation expense (account 608). In selecting an amortization period the staff should consider our policy to write off the investment in a timely manner while not overly distorting the income statement of any given period. We note that this year the situation envisioned here did not occur for the two GTE companies under consideration. However, if this situation occurs in the future, it should be treated as discussed above.

33. The staff's fourth proposal was to require the cessation of depreciation accruals for any account which has reached service value. This proposal was generally supported by the companies and

the states. However, there was concern that accruals would be stopped in one month and then restarted in the next month if a new plant addition caused the service value to exceed the depreciation reserve creating a month-by-month seesaw effect. We believe that if the service value check is made annually instead of monthly, most of these problems could be avoided. Thus, we direct the companies to reduce accruals for any account in any year to the degree required to avoid exceeding service value in that year. Further, we direct the companies to inform the FCC staff by letter of these actions. In the event that additions to the account leave the reserve level below its new service value, accruals should be reinstituted and the FCC staff should be informed.

F. *Negative Depreciation Rates*

34. In a few accounts with minimal plant balances, the use of the remaining-life method could result in negative depreciation rates if the reserve balances were in excess of service values (i.e., original cost less net salvage). The staff reviewed several of these instances and found that the primary cause was the transfer of plant from one account to another without a corresponding transfer of reserve amounts. The prescription of a negative depreciation rate is not consistent with generally accepted accounting principles. Therefore, we will adopt the use of a 0% depreciation rate for all accounts where the calculation of remaining-life depreciation rates would result in a negative rate. We recognize that this policy does not totally resolve the problem (i.e., reserves greater than service values). However, the problem is technical in nature and can probably best be resolved at the staff level. We note that this year the two GTE companies under consideration did not have this problem for any account. We direct the staff to work with the carriers to determine what reserve transfers, if any, are required should this problem occur in the future.

G. *Submission of Whole-Life Depreciation Studies*

35. In paragraph 82 of our *Report and Order* in Docket No. 20188, 83 FCC 2d at 290, we directed the staff to

> . . . keep the Commission fully informed as to the difference in amounts of annual charges involved in any recommendations for prescribed rates that it might make. For at least a period of three years, we require that all rates recommended for prescription carry with them a statement of the dollar impact in terms of annual expense, as between the rates calculated under the whole-life concept. Thereafter, the staff is to advise the Commission as to such differences wherever the proposed remaining-life rates results in an increase in proposed annual charges of 115% or more than the increase in annual charges arrived at by calculating whole-life rates.

36. With the prescription of the depreciation rates shown in the Appendix, we are completing the implementation of remaining-life

rates for all of the BOCs. However, after prescribing remaining-life rates for three years and considering the controversy that has developed regarding the pace at which reserve deficits are being written down, we find that it is more essential than ever that the companies file rates on both a whole-life and remaining-life basis. Inasmuch as the computerized systems which the carriers and regulators have in operation can easily determine both whole-life and remaining-life factors, we find that reporting both figures will cost the carriers and regulators very little. We, therefore, require the companies to continue to report whole-life rates to the Commission for at least the next three-year prescription cycle.

H. *Effective Dates*

37. With few exceptions, prior to 1981 depreciation rates were prescribed retroactively to the beginning of the year in which they were filed. This appeared to be a reasonable practice because the rates were based on depreciation studies made as of the beginning of the review year. In depreciation prescription orders issued in 1981 and 1982, after considering the regulatory and financial reporting aspects of effective dates (especially the matching of revenues to depreciation expenses), we determined that during the transitional period from whole-life to remaining-life and SLELG methods, we would allow the booking of the new rates on the various effective dates proposed by the companies. *See Depreciation Rates*, 88 FCC 2d 997; 92 FCC 2d 978; and 92 FCC 2d 712. Inasmuch as this order represents the third and final phase of the transition to the new methods, we shall again grant the effective dates proposed by the companies.

I. *Conclusion*

38. Having considered the proposals of the companies, the positions set forth by the companies and state commissions at the three-way meetings, the responses to the staff's review letters and Public Notice, and the recommendations of the staff, we adopt the composite remaining-life depreciation rates listed in the Appendix.

IV. *Ordering Clauses*

39. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

40. IT IS FURTHER ORDERED, That the companies shall

submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, ***Secretary***

Attachment: Appendix

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST - GEORGIA

Effective September 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	31	0	20.4	2.6
221	Central Office Equipment				
	Manual Sw (Non-Digital)	3.6	−5	74.2	8.6
	Automatic Sw (Non-Digital)	6.6	0	30.7	10.5
	Automatic Sw (Digital)	21	5	0.3	4.5
	Auto Msg Rec (Non-Digital)	5.2	−2	36.7	12.6
	Auto Msg Rec (Digital)	22	5	4.5	4.1
	Circuit	14	20	17.3	4.5
	Radio	9.8	−4	36.2	6.9
231	Station Apparatus				
	Telephone	5.7	1	25.8	12.8*
	Teletypewriter	4.1	3	−27.1	30.3
	Radiotelephone	4.4	0	77.8	5.0
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges	4.2	3	34.7	14.8
241	Pole Lines	16.4	−40	29.3	6.8
242.1	Aerial Cable	15.8	−13	35.6	4.9
242.2	Underground Cable	19.2	−11	12.3	5.1
242.3	Buried Cable	20	−6	24.2	4.1*
242.4	Submarine Cable	21	0	21.3	3.7
243	Aerial Wire	6.3	−50	−66.3	34.3
244	Underground Conduit	52	−1	15.1	1.7*
261	Furniture & Office Equipment	14.1	1	33.2	4.7
264	Vehicles & Other Work Equipment				
	Motor Vehicles	5.4	14	52.5	6.2
	Vehicle Shop Equipment	12.5	2	39	4.7
	Tools & Equipment	12.7	3	25.5	5.6

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST SOUTH CAROLINA

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	31	6	19.7	2.4*
221	Central Office Equipment				
	Manual Sw (Digital)	18.6	0	46.4	2.9
	Automatic Sw (Non-Digital)	3.6	2	34.1	17.8
	Automatic Sw (Digital)	17.5	5	5.6	5.1
	Auto Msg Rec (Non-Digital)	3	0	54.8	15.1
	Auto Msg Rec (Digital)	18.8	5	4.7	4.8
	Circuit	13.1	15	22.2	4.8
	Radio	14.3	−5	25	5.6
231	Station Apparatus				
	Telephone	6.4	3	20.6	11.9*
	Teletypewriter	3.8	3	49.2	12.6
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges	7.6	4	15.8	10.6*
241	Pole Lines	13.5	−30	32.7	7.2
242.1	Aerial Cable	14.1	−16	30.3	6.1
242.2	Underground Cable	25	−14	17.3	3.9
242.3	Buried Cable	20	−5	18.9	4.3
242.4	Submarine Cable	11.2	−5	12.4	8.3
243	Aerial Wire	7	−60	−224.6	54.9
244	Underground Conduit	46	−1	17.1	1.8*
261	Furniture & Office Equipment	9.5	5	11.3	8.8
264	Vehicles & Other Work Equipment				
	Motor Vehicles	5.9	19	45.5	6.0
	Vehicle Shop Equipment	13.3	2	6.4	6.9
	Tools & Equipment	12.7	3	22	5.9

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST - VIRGINIA

Effective October 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	37	0	14.7	2.3*
221	Central Office Equipment				
	Automatic Sw (Non-Digital)	7.2	0	25.8	10.3
	Automatic Sw (Digital)	14.8	5	0	6.4
	Auto Msg Rec (Non-Digital)	7.2	0	17.9	11.4
	Auto Msg Rec (Digital)	14.8	5	0	6.4
	Circuit	13.3	10	15.4	5.6
	Radio	9.8	−2	6	9.8
231	Station Apparatus				
	Telephone	6.2	10	32.5	9.3*
	Teletypewriter	3.6	0	−11.7	31.0
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges	3.4	3	41.1	16.4
241	Pole Lines	26	0	26.1	2.8
242.1	Aerial Cable	15.1	−10	26.5	5.5
242.2	Underground Cable	20	−5	9.5	4.8
242.3	Buried Cable	14.9	−2	0.4	6.8
243	Aerial Wire	8.8	−40	−196.8	38.3
244	Underground Conduit	43	−1	14.9	2.0*
261	Furniture & Office Equipment	10.8	0	41.9	5.4
264	Vehicles & Other Work Equipment				
	Motor Vehicles	5.1	7	72	4.1
	Tools & Equipment	10.9	5	48.2	4.3

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

# This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST - WEST VIRGINIA

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	45	0	14.3	1.9*
221	Central Office Equipment				
	Manual Sw (Digital)	14.8	5	0	6.4
	Automatic Sw (Non-Digital)	8.1	3	24.4	9.0
	Automatic Sw (Digital)	18.9	5	8.7	4.6
	Auto Msg Rec (Non-Digital)	9.1	4	−9.2	11.6
	Auto Msg Rec (Digital)	19.1	5	25.1	3.7
	Circuit	14.2	10	10.4	5.6
	Radio	9.8	−4	13.2	9.3
231	Station Apparatus				
	Telephone	6.2	2	17.8	12.9*
	Teletypewriter	4.1	0	11.1	21.7
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges	4.5	4	34.2	13.7
241	Pole Lines	19.6	5	30.4	3.3
242.1	Aerial Cable	19.6	−6	24.9	4.1
242.2	Underground Cable	25	−21	21.3	4.0
242.3	Buried Cable	16.1	−3	14.6	5.5
243	Aerial Wire	7.2	−40	−38.1	24.7
244	Underground Conduit	51	−1	21	1.6
261	Furniture & Office Equipment	15.9	2	23.5	4.7
264	Vehicles & Other Work Equipment				
	Motor Vehicles	4.8	9	47.9	9.0
	Vehicle Shop Equipment	11	5	27.6	6.1
	Tools & Equipment	12.7	3	52.6	3.5

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

# This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST - ARKANSAS

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	23.5	1	28.5	3.0*
221	Central Office Equipment				
	Analog Electronic	13.6	4	0	7.1
	Digital Electronic	16.7	0	0	6.0
	T.S.P.S.	13.6	3	8.8	6.5
	Manual Switching	3.5	2	31.4	19.0
	Automatic Switching	5.6	−4	39.8	11.5
	Automatic Message Recording	3.5	0	41.7	16.7
	Circuit	12.6	22	19.1	4.7
	Radio	10.4	1	41.1	5.6
231	Station Apparatus				
	Telephone	5.6	0	28.1	12.8
	Teletypewriter	7.3	13	37.3	6.8
	Radiotelephone	9.1	2	64.5	3.7
	Small PBX	4.4	0	65.4	7.9
	Telephone Booths	10.1	3	19.8	7.6
232	Station Connections - Other	–		–	5.0#
234	Large Private Branch Exchanges				
	Digital	6	6	33.1	10.2
	Other	1.7	−2	66.9	20.6
241	Pole Lines	15.6	−60	13.6	9.4
242.1	Aerial Cable	17.8	−25	28.3	5.4*
242.2	Underground Cable	26	−16	21.8	3.6
242.3	Buried Cable	19	−5	18.1	4.6
242.4	Submarine Cable	18.9	0	0	5.3
243	Aerial Wire	8.3	−128	−32.2	31.3
244	Underground Conduit	42	−5	21	2.0
	Microwave & Mobile Towers	11.7	−15	0	9.8
261	Furniture & Office Equipment				
	Other than Machines	16.1	2	16.7	5.0
	Machines	9.6	2	25.9	7.5
264	Vehicles & Other Work Equipment				
	Passenger Cars	3.5	16	43.4	11.6
	Pickups & Light Trucks	4.1	18	47.6	8.4
	Heavy Trucks	4.4	17	52.5	6.9
	Special Motor Vehicle Equip.	4.1	14	37.2	11.9
	Trucks, Tractors & Trailers used by Central Supply	2.4	4	0	40.0
	Trucks, Tractors & Trailers used by Area Cable Const.	9.4	4	0	10.2
	Shop Equipment	9.4	2	41.6	6.0
	Tools & Other Work Equipment	13.5	4	25.8	5.2
	Trailers	15.1	17	50.3	2.2
	Mobile Tools	5.9	18	37.1	7.6
	Aircraft	4.4	50	0	11.4

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST - NEW MEXICO

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	30	3	8.7	2.9*
221	Central Office Equipment				
	Analog Electronic	17.8	5	7.6	4.9
	Digital Electronic	16.7	5	0	5.7
	T.S.P.S.	13.6	3	8.8	6.5
	Manual Switching	2	6	41.5	26.3
	Automatic Switching	1.1	6	35.9	52.8
	Automatic Message Recording	2	6	51.8	21.1
	Circuit	12.6	11	29.4	4.7
	Radio	7.9	1	40.5	7.4
231	Station Apparatus				
	Telephone	6.7	1	28	10.6
	Teletypewriter	9	13	61.7	2.8
	Radiotelephone	9.1	8	42.1	5.5
	Small PBX	4.4	0	61.1	8.8
	Telephone Booths	10.1	3	32	6.4
232	Station Connections - Other	–			5.0#
234	Large Private Branch Exchanges				
	Digital	6.6	10	26.5	9.6
	Other	3.5	−2	58.9	12.3
241	Pole Lines	22	−65	47.4	5.3
242.1	Aerial Cable	16.2	−17	22.7	5.8
242.2	Underground Cable	28	−18	10.3	3.8
242.3	Buried Cable	23	−5	14.1	4.0
242.4	Submarine Cable	18.9	0	0	5.3
243	Aerial Wire	7.2	−47	2.8	20.0
244	Underground Conduit	47	−5	17.6	1.9*
	Microwave & Mobile Towers	11.7	−13	68.1	3.8
261	Furniture & Office Equipment				
	Other than Machines	16.1	4	16.3	5.0
	Machines	9.4	2	15.6	8.8
264	Vehicles & Other Work Equipment				
	Passenger Cars	3.5	16	52.7	8.9
	Pickups & Light Trucks	4.1	18	34.7	11.5*
	Heavy Trucks	4.4	17	45.6	8.5
	Special Motor Vehicle Equip.	4.1	14	30.2	13.6
	Trucks, Tractors & Trailers used by Central Supply	2.4	4	80.2	6.6
	Trucks, Tractors & Trailers used by Area Cable Const.	9.4	4	0	10.2
	Shop Equipment	7.6	2	26.7	9.4
	Tools & Other Work Equipment	13.5	4	34.9	4.5
	Trailers	11.2	17	79.6	0.3
	Mobile Tools	5	18	43.1	7.8
	Aircraft	4.4	50	0	11.4

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST - OKLAHOMA

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	23	6	22.8	3.1*
221	Central Office Equipment				
	Analog Electronic	17.4	5	7.9	5.0
	Digital Electronic	20	5	7.7	4.4
	T.S.P.S.	13.6	3	8.8	6.5
	Manual Switching	1.5	3	54	28.7
	Automatic Switching	4.1	−1	38	15.4
	Automatic Message Recording	2.1	0	25	35.7
	Circuit	12.7	20	25.3	4.3
	Radio	10.4	1	58.7	3.9
231	Station Apparatus				
	Telephone	6.1	0	19.2	13.2
	Teletypewriter	7.3	13	38.3	6.7
	Radiotelephone	9.1	2	95.7	0.3
	Small PBX	4.4	0	81.6	4.2
	Telephone Booths	10.1	3	22.8	7.3
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges				
	Digital	6.2	10	30.6	9.6
	Other	3.9	−2	23.3	20.2
241	Pole Lines	18.5	−60	29.2	7.1
242.1	Aerial Cable	19.1	−24	25.5	5.2
242.2	Underground Cable	28	−14	10.1	3.7
242.3	Buried Cable	20	−5	19.4	4.3
242.4	Submarine Cable	18.9	0	44.8	2.9
243	Aerial Wire	5.7	−78	−44.2	39.0
244	Underground Conduit	51	−10	9.4	2.0*
	Microwave & Mobile Towers	11.7	−13	71	3.6
261	Furniture & Office Equipment				
	Other than Machines	15.3	2	26.7	4.7
	Machines	9.4	2	16.9	8.6
264	Vehicles & Other Work Equipment				
	Passenger Cars	3.5	16	52	9.1
	Pickups & Light Trucks	4.1	18	43.6	9.4
	Heavy Trucks	4.4	17	46.9	8.2
	Special Motor Vehicle Equip.	4.1	14	41.3	10.9
	Trucks, Tractors & Trailers used by Central Supply	2.4	4	0	40.0
	Trucks, Tractors & Trailers used by Area Cable Const.	9.4	4	55.7	4.3
	Shop Equipment	7.6	2	28.1	9.2
	Tools & Other Work Equipment	13.5	4	28.5	5.0
	Trailers	11.2	17	28.8	4.8
	Mobile Tools	5	18	14.6	13.5
	Aircraft	4.4	50	0	11.4

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

* This rate was prescribed previously.

This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST - TEXAS

Effective June 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	25	13	17.8	2.8*
221	Central Office Equipment				
	Analog Electronic	17.1	4	8.8	5.1
	Digital Electronic	18.8	0	10.6	4.8
	T.S.P.S.	18.7	3	8.8	4.7
	Manual Switching	2	3	28.8	34.1
	Automatic Switching	3.2	−2	43.2	18.4
	Automatic Message Recording	2.6	0	35.1	25.0
	Circuit	13.1	18	23.3	4.5
	Radio	10.4	1	28.6	6.8
231	Station Apparatus				
	Telephone	7.7	4	22.9	9.5
	Teletypewriter	7.3	13	23.2	8.7
	Radiotelephone	9.1	2	63.4	3.8
	Small PBX	4.4	0	46.4	12.2
	Telephone Booths	10.1	3	18.8	7.7
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges				
	Digital	6.1	10	27.1	10.3
	Other	1.9	−2	29.9	37.9
241	Pole Lines	18.5	−60	21.2	7.5
242.1	Aerial Cable	21	−21	23.6	4.6
242.2	Underground Cable	34	−13	14.1	2.9
242.3	Buried Cable	22	−5	14.3	4.1
242.4	Submarine Cable	18.9	0	38	3.3
243	Aerial Wire	6.9	−71	−28.7	28.9
244	Underground Conduit	47	−10	18	2.0*
	Microwave & Mobile Towers	11.7	−13	33.8	6.8
261	Furniture & Office Equipment				
	Other than Machines	15.3	2	22.7	4.9
	Machines	7.8	2	16.6	10.4
264	Vehicles & Other Work Equipment				
	Passenger Cars	3.5	16	41.9	12.0
	Pickups & Light Trucks	4.1	18	43	9.5
	Heavy Trucks	4.4	17	48.1	7.9
	Special Motor Vehicle Equip.	4.1	14	41.3	10.9
	Trucks, Tractors & Trailers used by Central Supply	2.4	4	91.5	1.9
	Trucks, Tractors & Trailers used by Area Cable Const.	9.4	4	62.2	3.6
	Shop Equipment	7.6	2	25.5	9.5
	Tools & Other Work Equipment	13.5	4	24.1	4.6
	Trailers	11.2	17	37.8	4.0
	Mobile Tools	5	18	21	12.2
	Aircraft	4.4	50	23.7	6.0

All factors are computed on a composite basis; rates are to be applied to both Vintage Group (VG) and Equal Life Group (ELG) vintages.

*** This rate was prescribed previously.**

# This rate is not based upon life, salvage and reserve factors.

FCC 83-589

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for:

United Inter-Mountain Telephone Company

ORDER

(Adopted: December 14, 1983; Released: December 20, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *Introduction*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of these classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe revised percentages of depreciation (depreciation rates) for the United Inter-Mountain Telephone Company using the straight-line vintage group remaining-life (remaining-life) method.

II. *Background*

A. *Remaining-Life Method*

2. Prior to 1981, we had only used the straight-line vintage group whole-life (whole-life) depreciation method in prescribing depreciation rates for telephone company plant. Using this method, we determined the depreciation accruals applicable to each year's operations using current estimates of life and net salvage. As estimates of life and net salvage changed over time, the whole-life rates were changed in accordance with the changing estimates. However, using whole-life concepts, no attempt was made to adjust the rates to allow for reserve surpluses or deficits resulting from the cumulative over-or under-estimation of life and net salvage factors. This changed with our final decision in *Property Depreciation* , Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration* , 87 FCC 2d 916 (1981), where we revised Part 31 of the Rules and Regulations,

the "Uniform System of Accounts for Class A and B Telephone Companies," to allow the use of the remaining-life depreciation method. The remaining-life method is designed to distribute the unrecovered cost (original cost less the sum of the depreciation reserve and future net salvage) of a group of assets over its life expectancy. Inherent in this method is an allocation of any reserve deficit or surplus over the estimated average remaining life.

3. We directed the staff to phase in the implementation of remaining-life depreciation rates in conjunction with the normal triennial represcription cycle. Implementation began for United Inter-Mountain with its submission of a special study for the terminal equipment accounts supporting revised depreciation rates using the remaining-life method. After a complete review, we adopted remaining-life depreciation rates for these accounts in January 1982. *See Depreciation Rates* , 88 FCC 2d 1391 (1982). Remaining-life rates for all of United Inter-Mountain's accounts were reviewed in detail this year. Our findings and conclusions regarding these rates are discussed beginning in paragraph 7.

B. *Review Procedures*

4. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a company only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the company's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the company's filings and the preliminary FCC staff proposals at a conference in which representatives of the company, the staffs of the respective state commission(s), and the FCC staff participate (i.e., a three-way meeting).

5. United Inter-Mountain submitted a study proposing new depreciation rates based upon revised life and salvage estimates. This study was reviewed in detail by the FCC staff, which then prepared its own preliminary life, net salvage, and rate proposals and forwarded them to the company and the state commissions. The state commissions prepared similar studies and recommendations. A three-way meeting was then held at which the life, net salvage, and depreciation rate proposals of all parties were thoroughly discussed.

6. After completing its analysis and arriving at recommendations, the FCC staff issued a Public Notice on September 2, 1983,

entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies-Notice of Opportunity for Comment." The staff transmitted to the company and state commissions a copy of the September 2 Public Notice and schedules showing the proposed remaining-life rates.

III. *Discussion of Issues*

7. This is the third consecutive year in which we have addressed the general issues raised by our depreciation represcriptions. Accordingly, we do not here address in detail every issue raised by every commenter.[1] We focus instead on those issues that have not been raised previously and on those that affect United Inter-Mountain specifically, as opposed to depreciation rates generally.[2]

A. *Depreciation Methods*

8. In our decision in Docket No. 20188 we directed the staff to undertake the review of remaining-life depreciation rates for embedded investment in all plant accounts. This method was adopted in an attempt to allocate existing reserve deficits over the remaining life of embedded plant not subject to SLELG treatment. We have reaffirmed this decision in four prescription orders. *See Depreciation Rates* , 88 FCC 2d 1223 (1982); 88 FCC 2d 1354 (1982); 92 FCC 2d 920 (1982); and 92 FCC 2d (1982). Nevertheless, several states have questioned the use of the remaining-life method on the grounds that it fails to match depreciation expenses with capital consumption by changing accrual rates to recover embedded reserve deficiencies. Our goal has been, and will continue to be, the distribution of the full cost of an asset in reasonable manner over its service life. We continue to support our decision to implement the remaining-life method, noting that the "true-up" of reserve imbalances over the remaining life of

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[1] Comments were filed by American Telephone and Telegraph Co. (AT&T), ten telephone operating companies, twenty state regulatory commissions, and the National Association of Regulatory Utility Commissioners (NARUC). A copy of each of these comments and a staff-prepared summary of these comments are available for inspection in the Commission's Common Carrier Bureau offices. Although we do not specifically address each comment in this decision, we have carefully considered all the issues raised.

[2] For example, several state commissions continue to object to this Commission's preemption of state authority over depreciation rates. *See Amendment of Part 31* , 92 FCC 2d 864 (1982), *appeal pending sub nom. Virginia State Corporation Commission v. FCC* , Civ. No. 83–1136 (4th Cir. filed February 11, 1983). These commissions indicate that they have not approved the remaining-life or SLELG depreciation methods for their jurisdictions. This is not the proper forum to reargue the preemption issue, and the pendency of an appeal does not affect the enforceability of our decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland* , C.A. No. N83–855 (D. Md. April 7, 1983). The state commissions are required to use the depreciation rates prescribed here for state ratemaking purposes.

an account was the primary reason for our decision in Docket No. 20188.

B. *Life and Net Salvage Factors*

9. Three-way agreement on life and salvage factors was achieved for all accounts of United Inter-Mountain in both its Tennessee and Virginia jurisdictions. As a result, we concur in the life and salvage proposals of the staff as reflected in the depreciation rates in the Appendix to this order.

C. *Amortization and Dying Accounts*

10. In Docket No. 20188 we expressed our concern that depreciation rates be prescribed in a manner that would assure 100% capital recovery. Consistent with this policy, we revised our rules to allow for the use of the remaining-life method. In the two years since we first prescribed rates using this method, there have been several instances in which plant balances approached or reached zero and the associated reserve balance was significantly positive or negative. Such occurrences were expected during the transition to the new method because the prior whole-life method made no attempt to resolve reserve problems that had developed over a period of years. It should be noted that the causes of these imbalances have not necessarily been determined to be those envisioned in the portion of our Rules related to the disposition of reserve problems (*See* 47 C.F.R. 31.02–83). A few state commissions commented that the resolution of such problems should be left to their discretion. Such a policy would clearly be inconsistent with our position on preemption of depreciation matters. As a result, we find this suggestion to be without merit. Nevertheless, we direct the staff actively to solicit state views on reserve problems and keep us informed if alternative treatments are indicated.

11. In the Public Notice the staff proposed four procedures designed to reduce the chance that a significant reserve deficit or surplus would occur for a dying account, and to provide a mechanism to eliminate the deficit or surplus which will inevitably arise at the demise of an account. These procedures are as follows:

> (1) When a zero plant balance occurs and there is a small reserve balance, charge or credit this balance to the depreciation expense account.
>
> (2) When a zero plant balance occurs and there is a material reserve balance, amortize the balance over a period to be determined by the Commission.
>
> (3) When a plant balance is small and a large reserve deficit exists, apply the depreciation rate to the net book cost instead of the original cost. This would avoid the necessity of prescribing extremely high rates and ease the administration of the depreciation process in the last few years of a dying account, yet have no significant impact on actual expense levels.
>
> (4) If in any month the prescribed annual accrual is such that the reserve balance would exceed the service value, the company would be required to

reduce the accrual such that the reserve balance would not exceed the service value.

12. The first two procedures proposed by the staff cover situations in which there is a zero plant balance and a non-zero reserve balance. With no assets in service and, thus, with no remaining life, the remaining-life depreciation method clearly cannot resolve the reserve imbalance. We believe, as do most of the commenting parties, that the procedures proposed by the staff will adequately resolve the reserve imbalances. We offer the following to clarify the procedures to be employed.

13. For an account in which the plant balance is zero and the reserve balance is material, the company is required to file with this Commission a report which contains the amount of the reserve, a description of the conditions which created the reserve imbalance, and the company's proposed accounting treatment to resolve the imbalance. Unless otherwise stated or approved, we will consider any amount in excess of 1% of a carrier's annual depreciation expense in the jurisdiction in question to be material and, thus, to require filings. Among the accounting options we will consider are as follows: (1) booking the reserve amount as an extraordinary retirement (account 138) with an amortization of that amount through account 609 over a specified period; and (2) amortization of the reserve amount through depreciation expense (account 608). The filing must be made 90 days prior to the company's closing of its annual books of account, and a copy is to be concurrently submitted to the state commission having jurisdiction. For an account in which the plant balance is zero and the reserve balance is not material the company must charge or credit the amount of the reserve balance to account 608.

14. We believe that situations in which the plant balance drops to zero while the reserve balance is other than zero will occur in the future in a few accounts. However, we believe that instances in which the reserve balances are material should occur very infrequently, inasmuch as the remaining-life depreciation method we have adopted and our Rules regarding extraordinary retirements will allow for the timely recovery of these reserve deficiencies. We note that this year no such problems occurred for United Inter-Mountain. However, if such problems occur in the future they are to be resolved consistent with the policies discussed above.

15. The third procedure proposed by the staff is aimed at resolving reserve imbalances for those accounts with existing plant balances. Various parties argued that the staff's proposed procedure is counter to the Commission's Rules (*See* 47 C.F.R. 31.02–81(a)) which do not provide for the application of a depreciation rate to net plant and do not provide an account for net plant. Most commenting parties stated that the staff's proposal would be difficult to administer and would not allow for full capital recovery. Although we do not

agree that the use of this procedure is inconsistent with our Rules, we do agree that the specific procedure proposed in the Public Notice may prove cumbersome and may not result in 100% capital recovery. However, we believe that if the staff's proposed procedure is modified as discussed below, it could be used to resolve such reserve problems in an effective manner.

16. In accounts with large reserve imbalances such that the application of the remaining-life depreciation method would result in extremely high depreciation rates (i.e., approaching or in excess of 100%), we direct the staff to determine a reasonable period over which the net book cost less estimated future net salvage can be amortized. The net book cost less future net salvage as of the study date should be divided by the amortization period to determine the equal annual amount to be charged to depreciation expense (account 608). In selecting an amortization period the staff should consider our policy to write off the investment in a timely manner while not overly distorting the income statement of any given period. We note that this year the situation envisioned here did not occur for United Inter-Mountain. However, if this situation occurs in the future it should be treated as discussed above.

17. The staff's fourth proposal was to require the cessation of depreciation accruals for any account in which the reserve balance has reached its service value. This proposal was generally supported by the companies and the states. However, there was concern that accruals would be stopped in one month and then restarted in the next month if a new plant addition caused the service value to exceed the depreciation reserve creating a month-by-month seesaw effect. We believe that if the service value check is made annually instead of monthly, most of these problems could be avoided. Thus, we direct the companies to reduce accruals for any account in any year to the degree required so that the reserve balance does not exceed its service value in that year. Further, we direct the companies to inform the FCC staff by letter of these actions. In the event that additions to the account leave the reserve level below its new service value, accruals should be reinstituted and the FCC staff should be informed.

D. *Negative Depreciation Rates*

18. In a few accounts with minimal plant balances, the use of the remaining-life method would result in negative depreciation rates because the reserve balances were in excess of service values (i.e., original cost less net salvage). The staff reviewed several of these instances (i.e., for United Inter-Mountain and other companies) and found that the primary cause was the transfer of plant from one account to another without a corresponding transfer of reserve amounts. The prescription of a negative depreciation rate is not consistent with generally accepted accounting principles. Therefore,

we will adopt the use of a 0% depreciation rate for all accounts where the calculation of remaining-life depreciation rates would result in a negative rate. We recognize that this action does not totally resolve the problem (i.e., reserves greater than service values). However, the problem is technical in nature and can probably best be resolved at the staff level. We direct the staff to work with the company to determine what reserve transfers, if any, are required.

E. *Submission of Whole-Life Depreciation Studies*

19. In paragraph 82 of our *Report and Order* in Docket No. 20188, 83 FCC 2d at 290, we directed the staff to

> . . . keep the Commission fully informed as to the difference in amounts of annual charges involved in any recommendations for prescribed rates that it might make. For at least a period of three years, we require that all rates recommended for prescription carry with them a statement of the dollar impact in terms of annual expense, as between the rates calculated under the whole-life concept. Thereafter, the staff is to advise the Commission as to such differences wherever the proposed remaining-life rates results in an increase in proposed annual charges of 115% or more than the increase in annual charges arrived at by calculating whole-life rates.

20. With the prescription of the depreciation rates shown in the Appendix, we are completing the implementation of remaining-life rates for United Inter-Mountain. However, after prescribing remaining-life rates for three years and considering the controversy that has developed regarding the pace at which reserve deficits are being written down, we find that it is more essential than ever that the companies file rates on both a whole-life and remaining-life basis. Inasmuch as the computerized systems which the carriers and regulators have in operation can easily determine both whole-life and remaining-life factors, we find that reporting both figures will cost the carriers and regulators very little. We, therefore, require the companies to continue to report whole-life rates to the Commission for at least the next three-year prescription cycle.

F. *Conclusion*

21. Having considered the proposals of the company, the positions set forth by the company and state commissions at the three-way meetings, the responses to the staff's review letters and Public Notice, and the recommendations of the staff, we find the remaining-life depreciation rates listed in the Appendix to be appropriate.

IV. *Ordering Clauses*

22. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective January 1, 1983.

23. IT IS FURTHER ORDERED, That United Inter-Mountain shall submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment: Appendix

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED INTER-MOUNTAIN TELEPHONE COMPANY - TENNESSEE

Effective January 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings				
	Buildings	30	0	20.3	2.7
	Buildings - Other	30	0	20.3	2.7
221	Central Office Equipment				
	Manual	1.5	−2	94	5.3
	Step-byStep	3	10	44.8	15.1
	Crossbar	5.5	9	31.8	10.8
	Automatic Switching ETS-4	4.5	−1	21	17.8
	Circuit	14.5	12	25.5	4.3
	Radio	6	0	39.3	10.1
	Mobile Radio	–			0. #
	Electronic	20	0	5.3	4.7
	Automatic Message Recording	3.5	−1	30.1	20.3
231	Station Apparatus				
	Telephone & Other	4.5	15	20.5	14.3
	Mobile Radiotelephone	1.5	0	91	6.0
	Subscriber MX Equip & Booths	7.6	6	23.4	9.3
232	Station Connections - Other	–	–		5.0#
234	Large Private Branch Exchanges				
	Digital & Electronic Stored	6.3	5	19.5	12.0*
	Other	3	−2	−25	42.3
241	Pole Lines	16.9	−20	33.5	5.1
242.1	Aerial Cable	19.2	−2	29.6	3.6
242.2	Underground Cable	23	0	17.7	3.6
242.3	Buried Cable	17.6	−1	18	4.7
242.4	Submarine Cable	2	0	88.7	5.7
243	Aerial Wire	10.7	−50	59.7	8.4
244	Underground Conduit	40	0	19.3	2.0*
261	Furniture & Office Equipment	15.5	6	25.5	4.4
	Data Processing Computer	4.5	5	17.5	17.2
264	Vehicles & Other Work Equipment				
	Passenger Cars	6.3	15	50	5.6
	Light Trucks & Vans	6.3	15	50	5.6
	Heavy Trucks	6.3	15	50	5.6
	Sp. Pur. Veh. & OWE	6.3	15	50	5.6

* This rate was prescribed previously.
# This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED INTER-MOUNTAIN TELEPHONE COMPANY - VIRGINIA

Effective January 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings				
	Buildings	29	0	21.5	2.7
	Buildings - Other	29	0	21.5	2.7
221	Central Office Equipment				
	Manual	1.5	−4	70.3	22.5
	Step-byStep	4.8	3	53.3	9.1
	Crossbar	8.2	−5	34.8	8.6
	Circuit	11	10	34.5	5.0*
	Radio	7	0	92.8	1.0
	Electronic	20	0	5.9	4.7
	Automatic Message Recording	2.5	−1	26.9	29.6
231	Station Apparatus				
	Telephones & Other	5	15	21	12.8
	Subscriber MX Equip & Booths	7.6	6	23.4	9.3
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges				
	Digital & Electronic Stored	4.9	9	28.3	12.8
	Other	2	−2	−16	59.0
241	Pole Lines	18.5	−35	35.1	5.4
242.1	Aerial Cable	19.6	−5	32	3.7
242.2	Underground Cable	23	−5	19.8	3.7
242.3	Buried Cable	16	−1	15.5	5.3
242.4	Submarine Cable	–	–	–	0. #
243	Aerial Wire	9.6	−55	49.6	11.0
244	Underground Conduit	40	0	18.6	2.0*
261	Furniture & Office Equipment	15.5	6	25.9	4.4
	Data Processing Computer	5.1	5	43	10.2
264	Vehicles & Other Work Equipment				
	Passenger Cars	5.3	13	44.4	8.0
	Light Trucks & Vans	5.3	13	44.4	8.0
	Heavy Trucks	5.3	13	44.4	8.0
	Sp. Pur. Veh. & OWE	11.7	0	57	3.7

* This rate was prescribed previously.
# This rate is not based upon life, salvage and reserve factors.

FCC 83-590

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934 as amended, for:

ALASCOM, INC.

ORDER

(Adopted: December 14, 1983; Released: December 20, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *Introduction*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of these classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. This order is the first depreciation prescription order for Alascom, Inc. By this order we prescribe percentages of depreciation (depreciation rates) for Alascom, Inc., using the straight-line vintage group remaining-life (remaining-life) method.

II. *Background*

A. *Remaining-Life Method*

2. Prior to 1981, we had only used the straight-line vintage group whole-life (whole-life) depreciation method in prescribing depreciation rates for telephone company plant. Using this method, we determined the depreciation accruals applicable to each year's operations using current estimates of life and net salvage. As estimates of life and net salvage changed over time, the whole-life rates were changed in accordance with the changing estimates. However, using whole-life concepts, no attempt was made to adjust the rates to allow for reserve surpluses or deficits resulting from the cumulative over- or under-estimation of life and net salvage factors. This changed with our final decision in *Property Depreciation,* Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), where we revised Part 31 of the Rules and Regulations, the

"Uniform System of Accounts for Class A and B Telephone Companies," to allow the use of the remaining-life depreciation method. The remaining-life method is designed to distribute the unrecovered cost (original cost less the sum of the depreciation reserve and future net salvage) of a group of assets over its life expectancy. Inherent in this method is an allocation of any reserve deficit or surplus over the estimated average remaining life.

3. We directed the staff to phase in the implementation of remaining-life depreciation rates for the larger FCC-subject companies in conjunction with the normal triennial represcription cycle. Implementation began with those companies that were scheduled for review in 1981. Those companies submitted studies supporting revised depreciation rates using the remaining-life method. After a complete review, we adopted remaining-life depreciation rates for those companies in January 1982. *See Depreciation Rates*, 88 FCC 2d 1223 (1982) and 88 FCC 2d 1354 (1982). Following the same procedure, we continued implementation with the adoption in December 1982 of remaining-life rates for those companies that were regularly scheduled for depreciation review in 1982. *See Depreciation Rates*, 92 FCC 2d 920 (1982) and 92 FCC 2d 978 (1982). Remaining-life rates for the remainder of the companies were reviewed in detail this year. Our findings and conclusions regarding remaining-life rates for Alascom are discussed beginning in paragraph 7.

B. *Review Procedures*

4. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a company only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the company's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the company's filings and the preliminary FCC staff proposals at a conference in which representatives of the company, the staffs of the respective state commission(s), and the FCC staff participate (i.e., a three-way meeting).

5. Alascom, Inc., submitted a study proposing new depreciation rates based upon life and salvage estimates. This study was reviewed in detail by the FCC staff, which then prepared its own preliminary life, net salvage, and rate proposals and forwarded them to the Company and the Alaska Public Utilities Commission. While a

three-way meeting between the Company, the state commission, and the FCC staff was not held, all issues were thoroughly discussed by letter and telephone among the parties.

6. After completing its analysis and arriving at recommendations, the FCC staff issued a Public Notice on September 2, 1983, entitled, "Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies-Notice of Opportunity for Comment." The staff transmitted to the company and state commission a copy of the September 2 Public Notice and a schedule showing the proposed remaining-life rates.

III. *Discussion of Issues*

7. This is the third consecutive year in which we have addressed the general issues raised by our depreciation represcriptions. Accordingly, we do not here address in detail every issue raised by every commenter.[1] We focus instead on those issues that have not been raised previously and on those that affect Alascom specifically, as opposed to depreciation rates generally.[2]

A. *Depreciation Methods*

8. In our decision in Docket No. 20188 we directed the staff to undertake the review of remaining-life depreciation rates for embedded investment in all plant accounts. This method was adopted in an attempt to allocate existing reserve deficits over the remaining life of the plant. We have reaffirmed this decision in two prescription orders. *See Depreciation Rates*, 88 FCC 2d 1223; 88 FCC 2d 1354; 92 FCC 2d 920; and 92 FCC 2d 978. Nevertheless, several states have questioned the use of the remaining-life method on the grounds that it fails to match depreciation expenses with capital consumption by changing accrual rates to recover embedded reserve deficiencies. Our

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[1] Comments were filed by American Telephone and Telegraph Co. (AT&T), ten telephone operating companies, twenty state regulatory commissions, and the National Association of Regulatory Utility Commissioners (NARUC). A copy of each of these comments and a staff-prepared summary of these comments are available for inspection in the Commission's Common Carrier Bureau offices. Although we do not specifically address each comment in this decision, we have carefully considered all the issues raised.

[2] For example, several state commissions continue to object to this Commission's preemption of state authority over depreciation rates. *See Amendment of Part 31*, 92 FCC 2d 864 (1982), *appeal pending sub nom. Virginia State Corporation Commission v. FCC*, Civ. No. 83–1136 (4th Cir. filed February 11, 1983). These commissions indicate that they have not approved the remaining-life or SLELG depreciation methods for their jurisdictions. This is not the proper forum to reargue the preemption issue, and the pendency of an appeal does not affect the enforceability of our decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, C.A. No. N83–855 (D. Md. April 7, 1983). The state commissions are required to use the depreciation rates prescribed here for state ratemaking purposes.

goal has been, and will continue to be, the distribution of the full cost of an asset in reasonable manner over its service life. We continue to support our decision to implement the remaining-life method, noting that the "true-up" of reserve imbalances over the remaining life of an account was the primary reason for our decision in Docket No. 20188.

B. *Life and Net Salvage Factors*

9. Three-way agreement on life and salvage factors was achieved for all accounts of Alascom after extensive review of its study and subsequent receipt of additional information from both the company and the state commission. As a result, we concur in the life and salvage proposals of the staff as reflected in the depreciation rates in the Appendix to this order.

C. *Amortization and Dying Accounts*

10. In Docket No. 20188 we expressed our concern that depreciation rates be prescribed in a manner that would assure 100% capital recovery. Consistent with this policy, we revised our rules to allow for the use of the remaining-life depreciation method. In the two years since we first prescribed rates using this method, there have been several instances in which plant balances approached or reached zero and the associated reserve balance was significantly positive or negative. Such occurrences were expected during the transition to the new method because the prior whole-life method made no attempt to resolve reserve problems that had developed over a period of years. It should be noted that the causes of these imbalances have not necessarily been determined to be those envisioned in the portion of our Rules related to the disposition of reserve problems (*See* 47 C.F.R. 31.02–83). A few state commissions commented that the resolution of such problems should be left to their discretion. Such a policy would clearly be inconsistent with our position on preemption of depreciation matters. As a result, we find this suggestion to be without merit. Nevertheless, we direct the staff actively to solicit state views on reserve problems and keep us informed if alternative treatments are indicated.

11. In the Public Notice the staff proposed four procedures designed to reduce the chance that a significant reserve deficit or surplus would occur for a dying account, and to provide a mechanism to eliminate the deficit or surplus which will inevitably arise at the demise of an account. These procedures are as follows:

(1) When a zero plant balance occurs and there is a small reserve balance, charge or credit this balance to the depreciation expense account.

(2) When a zero plant balance occurs and there is a material reserve balance, amortize the balance over a period to be determined by the Commission.

(3) When a plant balance is small and a large reserve deficit exists, apply the

depreciation rate to the net book cost instead of the original cost. This would avoid the necessity of prescribing extremely high rates and ease the administration of the depreciation process in the last few years of a dying account, yet have no significant impact on actual expense levels.

(4) If in any month the prescribed annual accrual is such that the reserve balance would exceed the service value, the company would be required to reduce the accrual such that the reserve balance would not exceed the service value.

12. The first two procedures proposed by the staff cover situations in which there is a zero plant balance and a non-zero reserve balance. With no assets in service and, thus, with no remaining life, the remaining-life depreciation method clearly cannot resolve the reserve imbalance. We believe, as do most of the commenting parties, that the procedures proposed by the staff will adequately resolve the reserve imbalances. We offer the following to clarify the procedures to be employed.

13. For an account in which the plant balance is zero and the reserve balance is material, the company is required to file with this Commission a report which contains the amount of the reserve, a description of the conditions which created the reserve imbalance, and the company's proposed accounting treatment to resolve the imbalance. Unless otherwise stated or approved, we will consider any amount in excess of 1% of a carrier's annual depreciation expense in the jurisdiction in question to be material and, thus, to require filings. Among the accounting options we will consider are as follows: (1) booking the reserve amount as an extraordinary retirement (account 138) with an amortization of that amount through account 609 over a specified period; and (2) amortization of the reserve amount through depreciation expense (account 608). The filing must be made 90 days prior to the company's closing of its annual books of account, and a copy is to be concurrently submitted to the state commission having jurisdiction. For an account in which the plant balance is zero and the reserve balance is not material the company must charge or credit the amount of the reserve balance to account 608.

14. We believe that situations in which the plant balance drops to zero while the reserve balance is other than zero will occur in the future in a few accounts. However, we believe that instances in which the reserve balances are material should occur very infrequently, inasmuch as the remaining-life depreciation method we have adopted and our Rules regarding extraordinary retirements will allow for the timely recovery of these reserve deficiencies. It should be noted that for Alascom no such problems occurred during this review. If in the future they do occur, however, they are to be resolved as discussed above.

15. The third procedure proposed by the staff is aimed at resolving reserve imbalances for those accounts with existing plant

balances. Several parties argued that the staff's proposed procedure is counter to the Commission's Rules (*See* 47 C.F.R. 31.02–81(a)) which do not provide for the application of a depreciation rate to net plant and do not provide an account for net plant. Most commenting parties stated that the staff's proposal would be difficult to administer and would not allow for full capital recovery. Although we do not agree that the use of this procedure is inconsistent with our Rules, we do agree that the specific procedure proposed in the Public Notice may prove cumbersome and may not result in 100% capital recovery. However, we believe that if the staff's proposed procedure is modified as discussed below, it could be used to resolve such reserve problems in an effective manner.

16. In accounts with large reserve imbalances such that the application of the remaining-life depreciation method would result in extremely high depreciation rates (i.e., approaching or in excess of 100%), we direct the staff to determine a reasonable period over which the net book cost less estimated future net salvage can be amortized. The net book cost less future net salvage as of the study date should be divided by the amortization period to determine the equal annual amount to be charged to depreciation expense (account 608). In selecting an amortization period the staff should consider our policy to write off the investment in a timely manner while not overly distorting the income statement of any given period. Although no such situations occurred for Alascom in this review, the procedures described above are to be used to resolve these situations in the future.

17. The staff's fourth proposal was to require the cessation of depreciation accruals for any account in which its reserve balance has reached its service value. This proposal was generally supported by the companies and the states. However, there was concern that accruals would be stopped in one month and then restarted in the next month if a new plant addition caused the service value to exceed the depreciation reserve, creating a month-by-month seesaw effect. We believe that if the service value check is made annually instead of monthly, most of these problems could be avoided. Thus, we direct the companies to reduce accruals for any account in any year to the degree required so that the reserve will not exceed the service value in that year. Further, we direct the companies to inform the FCC staff by letter of these actions. In the event that additions to the account leave the reserve level below its new service value, accruals should be reinstituted and the FCC staff should be informed.

D. *Negative Depreciation Rates*

18. In a few accounts with minimal plant balances, the use of the remaining-life method would result in negative depreciation rates because the reserve balances were in excess of service values (i.e.,

original cost less net salvage). The staff reviewed several of these instances and found that the primary cause was the transfer of plant from one account to another without a corresponding transfer of reserve amounts. The prescription of a negative depreciation rate is not consistent with generally accepted accounting principles. Therefore, we will adopt the use of a 0% depreciation rate for all accounts where the calculation of remaining-life depreciation rates would result in a negative rate. We recognize that this action does not totally resolve the problem (i.e., reserves greater than service values). However, the problem is technical in nature and can probably best be resolved at the staff level. We direct the staff to work with the carriers to determine what reserve transfers, if any, are required.

E. *Submission of Whole-Life Depreciation Studies*

19. In paragraph 82 of our *Report and Order* in Docket No. 20188, 83 FCC 2d at 290, we directed the staff to

> . . . keep the Commission fully informed as to the difference in amounts of annual charges involved in any recommendations for prescribed rates that it might make. For at least a period of three years, we require that all rates recommended for prescription carry with them a statement of the dollar impact in terms of annual expense, as between the rates calculated under the whole-life concept. Thereafter, the staff is to advise the Commission as to such differences wherever the proposed remaining-life rates results in an increase in proposed annual charges of 115% or more than the increase in annual charges arrived at by calculating whole-life rates.

20. With the prescription of the depreciation rates shown in the Appendix, we are completing the implementation of remaining-life rates for Alascom, Inc. However, after prescribing remaining-life rates for three years and considering the controversy that has developed regarding the pace at which reserve deficits are being written down, we find that it is more essential than ever that the companies file rates on both a whole-life and remaining-life basis. Inasmuch as the computerized systems which the carriers and regulators have in operation can easily determine both whole-life and remaining-life factors, we find that reporting both figures will cost the carriers and regulators very little. We, therefore, require the company to continue to report whole-life rates to the Commission for at least the next three-year prescription cycle.

F. *Conclusion*

21. Having considered the proposals of the company, the positions set forth by the companies and state commission in subsequent discussions, the responses to the staff's review letter and Public Notice, and the recommendations of the staff, we adopt the remaining-life depreciation rates listed in the Appendix.

IV. *Ordering Clauses*

22. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

23. IT IS FURTHER ORDERED, That Alascom, Inc., shall submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

Federal Communications Commission
William J. Tricarico, *Secretary*

Attachment: Appendix

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for ALASCOM, INC.

Effective January 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
212	Buildings	29	14	17	2.4
	Self-Supported Towers	17.8	−42	25.4	6.6
221	Central Office Equipment				
	Manual Switching	12.7	−5	33.6	5.6
	Automatic Switching	4.4	−5	38.2	15.2
	Automatic Message Recording	1.2	−3	42.7	50.3
	Automatic Sw (Telex)	11.8	−5	35.1	5.9
	Circuit	9.4	8	14.3	8.3
	Earth Station Equipment	6.9	5	27.6	9.8
	Satellite Equipment	8.3	0	0.5	12.0
231	Station Apparatus	5.2	10	21	13.3
232	Station Connections - Other	–	–	–	5.0#
234	Large Private Branch Exchanges	4.3	10	−42	30.7
241	Pole Lines	11.3	−25	−70.4	17.3
242.1	Aerial Cable	10.8	−10	17.1	6.8
242.2	Underground Cable	18.9	0	77.4	1.2
242.3	Buried Cable	18.8	5	2.1	5.5
242.4	Submarine Cable	5.6	−2	59.4	7.6
244	Underground Conduit	27.3	−3	44.7	2.1
261	Furniture & Office Equipment	12.3	20	18.2	5.0
	Computers	2.5	10	52.7	14.9
	Mini Computers	3.8	15	20.9	16.9
	Data Base Administration Comp.	4.6	10	0.8	19.4
264	Vehicles & Other Work Equipment				
	Other Work Equipment	8.5	13	53.6	3.9
	Motor Vehicles	8.9	13	43.2	4.9
	Aircraft	4.8	40	26.1	7.1

# This rate is not based upon life, salvage and reserve factors.

Common Carrier, Depreciation Rates, Prescription

These Orders prescribe depreciation rates for the telephone companies and accounts/subaccounts shown in Appendices to the Orders.
-Depreciation Rates

FCC 83-591

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for:

Bell Telephone Company of Nevada
The Bell Telephone Company of Pennsylvania
Cincinnati Bell, Incorporated
The Diamond State Telephone Company
The Mountain States Telephone and Telegraph Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone & Telegraph Company

ORDER

(Adopted: December 14, 1983; Released: December 20, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *INTRODUCTION*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of the classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe

revised percentages of depreciation (depreciation rates) for the nine Bell Operating Companies (BOCs) listed above using the straight line equal life group (SLELG) method.

II. *BACKGROUND*

A. *Straight Line Equal Life Group Method*

2. In *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), we amended our rules to permit the use of the SLELG depreciation method for new additions to plant as an alternative to the straight line vintage group (SLVG) method, provided that adequate data is available for the proper application of the method. The primary differences between the SLELG and SLVG methods lie in the definition of the basic depreciation groups and in the approach each takes in spreading the original cost of assets comprising the basic groups over their estimated average service lives. While SLVG forms its basic groups by combining all units placed in service in one year (i.e., a vintage group), SLELG creates its basic groups by combining all units within each vintage group which share an equal life expectancy (i.e., an equal life group). While the SLVG method is designed to depreciate 100% of the original cost of a vintage on average over the life cycle of each vintage, the SLELG method is designed to depreciate 100% of the original cost of each plant unit over its life. As a consequence, if projections are accurate, the SLELG method should allow for depreciation at a rate more representative of the actual consumption of units of property than SLVG. We concluded in Docket No. 20188 that the proper application and monitoring of this method would not only enhance the carriers' cash flow and present to all interested parties a more accurate and objective financial picture of the carriers' operations and capital requirements, but would also benefit their customers by encouraging innovation and the introduction of new technology.

3. Under both the SLVG and SLELG methods, retirement projections, service life estimates, and depreciation rates are normally determined, in part, through the use of survivor curves. These survivor curves define the relationship between the age of plant investment and the relative percentage expected to remain in service. Under the SLELG methodology, the survivor curves assume an added significance—that of defining the basic (equal life) groups. Under the SLVG method, most survivor curves are selected only after the staff has completed detailed statistical analysis of historical retirement data. With the added significance of the survivor curves in the SLELG method, the availability and analysis of historical retirement data become even more important.

4. We recognized the importance of adequate data in Docket No. 20188 where we found that the SLELG method is acceptable,

provided that it is assured that adequate data is available for proper application of the method; that record keeping and reporting practices will enable monitoring of the reasonableness of the rate of allocation of both original cost and provisions for salvage and removal; and that such allocation of original cost will achieve allocation over the service life of the property neither more nor less than 100% of the investment net of salvage value.[1] Accordingly, we directed the staff to take such measures as may be necessary to ensure the measurability and accountability of the results under the SLELG method.

5. We further directed the staff to phase in the implementation of SLELG depreciation rates beginning with the outside plant accounts, followed by the central office equipment and all other plant accounts. In accordance with this directive, the staff reviewed SLELG rates for the outside plant accounts for the BOCs in 1982. As a result of that review, we adopted SLELG rates for new additions to the outside plant accounts for all of the BOCs in *Depreciation Rates*, 90 FCC 2d 964 (1982), 92 FCC 2d 693 (1982) and 92 FCC 2d 920 (1982).

6. In 1982 and 1983 the staff also reviewed SLELG rates for the central office equipment accounts for the BOCs. As a result, we adopted SLELG rates for new additions to the central office equipment accounts for 19 of these companies in *Depreciation Rates*, 92 FCC 2d 693 and 92 FCC 2d 920. SLELG rates for the central office equipment accounts for the remainder of the BOCs are under consideration in another order adopted by the Commission today (see FCC 83–587, released December 20, 1983).

7. This year the staff reviewed SLELG rates for the buildings and general equipment accounts (i.e, furniture, computers, motor vehicles and other work equipment) for 17 of the BOCs. Eight of these companies were regularly scheduled for a complete review of depreciation rates this year and, thus, the SLELG rates for these companies are under consideration in the other order referred to in paragraph 6. For the nine companies not regularly scheduled for review in 1983, our findings and conclusions regarding SLELG rates are discussed below. The remainder of the BOCs did not submit studies requesting SLELG rates for these accounts in 1983. All of these carriers are scheduled for review next year and we expect them to file for SLELG rates for these accounts at that time.

B. *Review Procedures*

8. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a carrier only after the following actions have been completed:

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[1] Property Depreciation, 83 FCC 2d at 283.

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed revisions to the life and salvage factors.

(3) Independent staff analysis of such information as the carrier's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the carrier's filings and the preliminary Commission staff proposals at a conference in which representatives of the carrier and the staffs of the respective state commissions and the FCC participate (i.e., a three-way meeting.)

9. During the past year, in addition to the filings in conjunction with the staff's normal triennial review cycle, we received additional filing and studies: SLELG studies for the BOCs listed above, studies for 22 regional interexchange corporations in accordance with divestiture,[2] and annual update studies for the electromechanical equipment accounts for six filings in a timely manner required the staff to depart from its traditional procedures. Because it was apparent that there were insufficient staff resources to allow the complete review of life and salvage factors for the carriers requesting SLELG rates, the staff chose to omit portions of steps 2 and 3 above and instead to use the life and salvage factors which underlie currently prescribed rates. In addition, time and resource constraints precluded the discussion of SLELG rates with the carriers and respective state commissions at three-way meetings (i.e., step 5). Instead, comments regarding the carrier filings and preliminary staff proposals were solicited from the carriers and respective state commissions through correspondence and telephone conversations.

10. On August 26, 1983 the staff sent review letters to the BOCs and the respective state commissions outlining its assessment of the BOCs SLELG studies and the staff's own initial recommendations for SLELG rates. Comments were solicited from the carriers and the respective state commissions regarding the carrier and the FCC staff recommendations. Written comments were received from 15 of the parties. The staff analyzed these comments, made adjustments to its initial recommendations, and on September 30, 1983, issued a Public Notice (Report No. 6837) entitled, "Depreciation Rate Prescriptions Proposed For Domestic Telephone Companies-Notice Of Opportunity For Comment." This Public Notice summarized the FCC staff's proposals for revised depreciation rates and the change in depreciation expense that would result if those proposed depreciation rates were approved. During the first week of October, the staff transmitted to each company and respective state commission a copy of the

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[2] These corporations are being established in accordance with the reorganization plan of AT&T which was approved by the court in United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

September 30 Public Notice, schedules containing the proposed SLELG rates, and a depreciation rate report containing the staff analysis underlying the proposed SLELG depreciation rates.

III. *SUMMARY OF COMMENTS*

A. *August 26, 1983 Review Letter*

11. Comments to the staff's August 26, 1983 review letter were received from seven BOCs and seven state commissions.[3] In general the BOCs raised no objections to the staff's SLELG proposals for the general equipment accounts. However, several of the BOCs objected to the staff's proposal concerning the development of SLELG depreciation rates for the buildings account. Bell of Nevada, New Jersey Bell and Pacific Telephone agreed that the approach used in the staff's review letter is acceptable until further discussions can be undertaken at the next three-way meetings. Most of the companies objected to the compositing technique, account categorization, and the curve shapes proposed by the staff. These companies also stated that such topics should be addressed at the next regular represcription of depreciation rates.

12. The Arizona, Nevada, Utah and Wyoming commissions agreed with the FCC staff proposals. The Maine Commission stated that it had no comments at this time but that it would focus on the proposed depreciation rates for New England Telephone in conjunction with the complete review of depreciation rates scheduled for that company in 1984. The California Commission stated that it had no comments concerning the rates proposed for Pacific Telephone but still opposed the use of the SLELG method. The New Jersey Commission had no comments of a technical nature but stated that it had joined an appeal filed by the state of Virginia in the Fourth Circuit Court of Appeals, seeking to reverse the FCC's preemption of the States in matters of intrastate depreciation.

B. *September 30, 1983 Public Notice*

13. Responses to the staff's September 30, 1983 Public Notice were received from Bell of Pennsylvania, Diamond State Telephone and the state commission of Maine and Ohio. The Ohio Commission staff agreed that the SLELG method reflects a better matching of capital consumption than the SLVG method; however, it objected to the FCC staff's SLELG rate proposals because the FCC staff employed projection life, net salvage estimates and Gompertz-Makeham curves in determining those proposals. The Ohio Commission staff stated that the proper parameters for the development of

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[3] Comments were received from Bell of Nevada, Bell of Pennsylvania, Cincinnati Bell, Diamond State Telephone, Mountain Bell, New England Telephone, Pacific Northwest Bell, Pacific Telephone and the state commissions of Arizona, California, Maine, Nevada, New Jersey, Utah and Wyoming.

SLELG rates are the average service life, the average net salvage and Iowa curves.

14. The Maine Commission noted that neither it nor the FCC staff has performed a comprehensive analysis of New England Telephone's SLELG proposals. It recommended that the establishment of new SLELG rates for the buildings and general equipment accounts be deferred until a full review of New England Telephone's depreciation rates is completed in 1984. In addition Maine stated that it had not determined that the SLELG depreciation method is reasonable for intrastate rate-making purposes in Maine.

15. Bell of Pennsylvania and Diamond State Telephone disagreed with the FCC staff's methodology for arriving at SLELG depreciation rates for the buildings account. They stated that the inclusion of gross addition estimates to develop rates to be applied to future vintages of investment must be considered in order for those rates to reflect adequately the composition of plant investments to which they apply. They stated also that if their proposal were used, the average life for the new vintages would not equal the average service life underlying the currently prescribed depreciation rate.

IV. DISCUSSION

A. *Use of SLELG*

16. In our decision in Docket No. 20188, we considered the arguments expressed by the parties for and against the use of the SLELG method and determined that the use of SLELG rates is appropriate provided adequate data are available. In the discussion in the *Report and Order*, 83 FCC 2d 267, we found that the use of SLELG comports with the mandate of Section 1 of the Communications Act, "to make available . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151. We reaffirmed our decision allowing the use of SLELG in our *Order on Reconsideration*, 87 FCC 2d 916, as well as in prescription orders approved in 1982. *See* para. 5, *supra*. Nevertheless, whether the use of SLELG rates is warranted is still questioned by the California and Maine commissions. Inasmuch as neither the California nor Maine commission provided new arguments or evidence regarding the use of SLELG rates, we have no basis upon which to reconsider our decision on this matter. Our rules, as amended in Docket No. 20188, clearly allow the use of SLELG for accounts in which adequate data are available to apply and monitor its use properly.

B. *Preemption of States*

17. The New Jersey Commission appears to challenge again our decision in preempting the States in matters of intrastate depreciation. In Docket No. 79–105, *Amendment of Part 31*, 92 FCC 2d 864

(1982), *appeal pending sub nom. Virginia State Corporation Commission v. FCC*, Civ. No. 83–1136 (4th Cir., filed February 11, 1983), we considered whether a state commission could require a company to use depreciation rates other than those prescribed by the FCC. We concluded that, in fact, the most logical and reasonable interpretation of Section 220(b) of the Act is that state commissions are precluded from departing from the depreciation rates and methods prescribed by this Commission. The pendency of an appeal does not affect the enforceability of a Commission decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, C.A. No. N83–855 (D. Md. April 7, 1983); *Pacific Northwest Telephone Company v. Washington Utilities and Transportation Commission*, No. C83–2140 (W.D. Wash. March 10, 1983); *Southwestern Bell Telephone Company v. State Corporation of Kansas*, No. 83–4090 (D. Kan. April 8, 1983). Accordingly, the New Jersey Commission's contention is without merit.

C. *Life and Salvage Factors*

18. The Ohio Commission objected to the use of the projection life table (PLT) in the calculation of SLELG depreciation rates. Instead, it contended that the average service life (ASL) should be used. The PLT underlying the currently prescribed rate is designed for use in forecasting future mortality of both new as well as embedded assets.[4] On the other hand, the ASL underlying the currently prescribed depreciation rate is the composite of the average life of assets already retired and the forecasted average life of assets in service as of the last study. If the ASL were used, we would be assuming that new assets will have the identical life characteristics of embedded and previously retired assets. We find this assumption unacceptable. Inasmuch as we are prescribing SLELG rates for new assets only, we find that the PLT is the preferred parameter to use. It should be noted that not all accounts have been studied using PLTs. For these accounts, alternative parameters have been used.

19. The Ohio Commission also objected to the use of the future net salvage in the calculation of SLELG depreciation rates. Instead, it contended that we should use the average net salvage. Here, too, we are prescribing SLELG rates for new assets only; accordingly, the future net salvage is the preferred parameter to use in determining the net salvage segment of the SLELG rate.[5]

20. Additionally, the Ohio Commission objected to the FCC

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[4] To forecast future mortality of new assets, the entire PLT is used; to forecast future mortality of embedded assets, the PLT beyond the age of the assets being considered is used.

[5] In certain instances the use of the average net salvage may be appropriate, e.g.,

staff's and Cincinnati Bell's use of curves derived from the Gompertz-Makeham analysis in arriving at SLELG depreciation rates for Cincinnati Bell. It contended that we should use Iowa curves.[6] The Gompertz-Makeham analysis has been used extensively in developing projection life tables by the BOCs and the FCC staff for at least the last 30 years. We know of no evidence demonstrating that the use of one of these procedures leads to a depreciation rate appreciably different from that which would result from the use of the other procedure. In fact, the adequacy of both methods is well documented in various literature on depreciation. For example, in NARUC's *Public Utility Depreciation Practices* both Gompertz-Makeham and Iowa curves are two of several methods discussed for use in the mathematical curve fitting of observed retirement data. NARUC does not, however, give a preference of one method over the other method. Furthermore, the Ohio Commission provided no evidence to support its contention that Iowa curves should be used. We believe that both methods have merit if properly applied, and we have no preference for one over the other. The staff has developed the computer software to support the use of both methods; therefore, either method can be administered adequately. Consequently, we have no objections to a company using either method at this time. Inasmuch as both methods are generally accepted, we can see no need to require Cincinnati Bell to use Iowa curves.

21. The Maine Commission suggested that SLELG rates for the buildings and general equipment accounts be deferred for New England Telephone until a full review of the company's life and salvage factors is completed in 1984. We agree that it would be preferable to prescribe rates only after all the steps outlined in paragraph 8 are completed; however, the completion of all the steps outlined in that paragraph would have resulted in an unacceptable delay in the implementation of SLELG rates. We, therefore, find that the staff's proposed departure from the traditional review procedures was justified. We find that the benefits derived from implementing SLELG for the buildings and general equipment accounts in a timely manner outweigh any advantages (i.e., improving the precision of the estimates through the preparation and review of new studies of life and salvage) that may be derived from waiting until 1984 to prescribe these rates.

22. In response to the staff's review letters, several companies opposed the FCC staff's compositing procedure. After further discussions and the issuance of the September 30 Public Notice, however,

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when there is a strong, well-defined relationship between the age of retirements and net salvage. However, this is not the case for the accounts studied here. This issue is discussed more fully in *Depreciation Rates*, 90 FCC 2d 964 (1982).

[6] The Iowa Type Survivor Curves were developed by the Engineering Research Institute, Iowa State University. These curves, commonly referred to as Iowa curves, are used extensively in describing retirement dispersion for utility plant.

only Bell of Pennsylvania and Diamond State Telephone continue to oppose the procedure. These companies stated that the staff's procedure did not consider the estimated plant mix by category for new additions. On the other hand, they argued that their proposed procedure did consider the estimated plant mix by category. However, as they pointed out in their comments, if their procedure were used, the average life for the new vintages would not equal the average service life underlying the currently prescribed depreciation rate.[7] Because time and resource constraints have precluded the possibility of the staff preparing and reviewing detailed studies related to life and salvage factors, the staff has determined that the SLELG rates should be based upon the life and salvage factors determined in conjunction with the last complete review of the companies' depreciation rates. The procedure proposed by the companies conflicts with the staff's approach of expediting the review process by using parameters underlying the currently prescribed depreciation rate. Inasmuch as the procedure proposed by Bell of Pennsylvania and Diamond State Telephone is not consistent with currently prescribed rates, and detailed studies in support of the proposed rates have not been completed or reviewed, we believe that the rates proposed by these companies are unacceptable. We do, however, direct the staff to review the procedure proposed by Bell of Pennsylvania and Diamond State Telephone during the next complete review of depreciation rates and to make recommendations regarding the merits of their procedure.

D. *Conclusion*

23. Having considered the responses to the staff's review letters and public notices, the recommendations of the staff, and the proposals of the companies, we find the resulting SLELG rates listed in the Appendix to be in the public interest.

24. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment: Appendix

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[7] The Iowa Type Survivor Curves were developed by the Engineering Research Institute, Iowa State University. These curves, commonly referred to as Iowa curves, are used extensively in describing retirement dispersion for utility plant.

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
BELL TELEPHONE COMPANY OF NEVADA

Effective January 1, 1984

				Original Coat Rates				
Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year 0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	40	−2	3.9	3.6	3.4	3.3	0.1
261	Furniture & Office Equipment							
	Storeroom & Other	17.4	7	9.6	9.0	8.4	7.8	−0.4
	Computer & AMA System	8	0	22.6	20.9	17.6	14.8	0.
264	Vehicles & Other Work Equipment	9.4	17	16.5	14.4	13.2	12.2	−1.8

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA

Effective January 1, 1983

				Original Coat Rates				
Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year 0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	47	2	3.2	3.0	2.9	2.8	0.
261	Furniture & Office Equipment	17.6	3	8.2	8.2	8.1	7.9	−0.2
	Computer Equipment	7	9	15.5	15.4	15.2	14.8	−1.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.5	11	13.0	12.7	12.6	12.3	−1.3
	Other Work Equipment	20	2	13.6	9.9	8.2	7.3	−0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
CINCINNATI BELL, INCORPORATED - KENTUCKY

Effective January 1, 1983

				Original Coat Rates				
Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year 0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	40	4	3.8	3.6	3.4	3.3	0.1
261	Furniture & Office Equipment	31	8	6.1	5.4	4.9	4.6	−0.3
	Computer & AMA Systems	9.5	5	15.5	14.6	13.4	12.3	−0.5
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.5	20	12.4	12.3	12.2	12.1	−2.4
	Other Work Equipment	20	3	10.1	9.6	8.8	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
CINCINNATI BELL, INCORPORATED OHIO

Effective January 1, 1983

				Original Coat Rates				
Acct.		*Proj.*	*Net*	*Year*				*Salv.*
No.	*Class or Subclass of Plant*	*Life*	*Salv.*	*0.0*	*0.5*	*1.5*	*2.5*	*Rate*
		(a)	*(b)*	*(c)*	*(d)*	*(e)*	*(f)*	*(g=-b/a)*
		(Yrs.)	(%)	(%)	(%)	(%)	(%)	(%)
212	Buildings	48	−1	3.1	3.0	2.9	2.8	0.
261	Furniture & Office Equipment	36	8	5.2	4.6	4.2	4.0	−0.2
	Computer & AMA Systems	9	5	16.3	15.4	14.0	12.9	−0.6
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.4	20	12.6	12.5	12.4	12.3	−2.4
	Other Work Equipment	20	3	10.1	9.6	8.8	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE DIAMOND STATE TELEPHONE COMPANY

Effective January 1, 1983

				Original Coat Rates				
Acct.		*Proj.*	*Net*	*Year*				*Salv.*
No.	*Class or Subclass of Plant*	*Life*	*Salv.*	*0.0*	*0.5*	*1.5*	*2.5*	*Rate*
		(a)	*(b)*	*(c)*	*(d)*	*(e)*	*(f)*	*(g=-b/a)*
		(Yrs.)	(%)	(%)	(%)	(%)	(%)	(%)
212	Buildings	43	3	3.5	3.3	3.2	3.1	−0.1
261	Furniture & Office Equipment	19.8	5	8.7	7.5	6.9	3.1	−0.3
	Computer Equipment	8	9	13.6	13.5	13.3	13.1	−1.1
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.2	20	13.6	13.0	12.7	12.5	−2.4
	Other Work Equipment	15	2	16.9	12.1	9.9	8.7	−0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - ARIZONA

Effective January 1, 1983

				Original Coat Rates				
Acct.		*Proj.*	*Net*	*Year*				*Salv.*
No.	*Class or Subclass of Plant*	*Life*	*Salv.*	*0.0*	*0.5*	*1.5*	*2.5*	*Rate*
		(a)	*(b)*	*(c)*	*(d)*	*(e)*	*(f)*	*(g=-b/a)*
		(Yrs.)	(%)	(%)	(%)	(%)	(%)	(%)
212	Buildings	40	−4	3.8	3.5	3.4	3.3	0.1
261	Furniture & Office Equipment	24	1	9.7	7.8	6.8	6.2	0.
	Computer & AMA Systems	7	2	18.0	15.8	14.8	14.3	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	10.3	18	11.8	11.1	10.6	10.3	−1.7
	Other Work Equipment	18	7	17.7	12.0	9.5	8.2	−0.4

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPONE AND TELEGRAPH COMPANY - COLORADO

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year* 0.0 *(c)* (%)	0.5 *(d)* (%)	1.5 *(e)* (%)	2.5 *(f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	41	−2	3.6	3.4	3.3	3.2	0.
261	Furniture & Office Equipment	26	1	7.4	6.9	6.5	6.1	0.
	Computer & AMA Systems	7	2	15.3	15.3	15.3	15.1	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.8	15	14.1	14.1	13.9	13.5	−1.9
	Other Work Equipment	15.8	29	19.4	13.1	10.3	8.8	−1.8

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - IDAHO

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year* 0.0 *(c)* (%)	0.5 *(d)* (%)	1.5 *(e)* (%)	2.5 *(f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	40	−1	3.8	3.6	3.4	3.3	0.
261	Furniture & Office Equipment	23	4	8.9	7.5	6.7	6.1	−0.2
	Computer & AMA Systems	8	2	15.9	14.0	13.1	12.7	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	9.6	15	11.8	11.8	11.8	11.6	−1.6
	Other Work Equipment	15	8	20.4	13.7	10.7	9.1	−0.5

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - MONTANA

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year* 0.0 *(c)* (%)	0.5 *(d)* (%)	1.5 *(e)* (%)	2.5 *(f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	42	−2	3.6	3.4	3.3	3.2	0.
261	Furniture & Office Equipment	22	3	6.5	6.4	6.2	6.0	−0.1
	Computer & AMA Systems	8	2	12.7	12.7	12.7	12.7	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.9	15	13.1	12.7	12.5	12.2	−1.7
	Other Work Equipment	18	26	17.7	12.0	9.5	8.2	−1.4

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - NEW MEXICO

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year*				*Salv. Rate (g=-b/a)* (%)
				0.0 (c) (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	
212	Buildings	39	−2	3.8	3.6	3.4	3.4	0.1
261	Furniture & Office Equipment	23	1	8.5	7.5	6.8	6.3	0.
	Computer & AMA Systems	8	2	15.9	14.0	13.1	12.7	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	10	11	11.8	11.2	10.8	10.6	−1.1
	Other Work Equipment	16	14	19.4	13.1	10.2	8.8	−0.9

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - UTAH

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year*				*Salv. Rate (g=-b/a)* (%)
				0.0 (c) (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	
212	Buildings	43	−2	3.5	3.3	3.2	3.1	0.
261	Furniture & Office Equipment	24	2	6.6	6.6	6.5	6.3	−0.1
	Computer & AMA Systems	7	2	18.0	15.8	14.8	14.3	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.6	22	12.4	12.4	12.4	12.4	−2.6
	Other Work Equipment	16	17	19.4	13.1	10.2	8.8	−1.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY - WYOMING

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year*				*Salv. Rate (g=-b/a)* (%)
				0.0 (c) (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	
212	Buildings	40	−1	3.8	3.6	3.4	3.3	0.
261	Furniture & Office Equipment	26	1	5.8	5.8	5.8	5.6	0.
	Computer & AMA Systems	8	2	13.3	13.3	13.3	13.3	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8.5	15	12.7	12.7	12.7	12.6	−1.8
	Other Work Equipment	16	15	19.4	13.1	10.2	8.8	−0.9

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - MAINE

Effective January 1, 1983

Original Coat Rates

Acct. *No.*	*Class or Subclass of Plant*	*Proj.* *Life* *(a)* (Yrs.)	*Net* *Salv.* *(b)* *(%)*	*Year* *0.0* *(c)* (%)	*Year* *0.5* *(d)* (%)	*Year* *1.5* *(e)* (%)	*Year* *2.5* *(f)* (%)	*Salv.* *Rate* *(g=-b/a)* (%)
212	Buildings	44	4	3.5	3.3	3.2	3.1	−0.1
261	Furniture & Office Equipment							
	Other	25	11	7.9	6.6	6.0	5.6	−0.4
	Computer & AMA Equipment	5.9	22	20.6	19.5	18.3	17.2	−3.7
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.7	6	15.7	14.9	14.2	13.7	−0.8
	Other Work Equipment	11	−1	16.4	13.4	11.7	10.7	0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - MASSACHUSETTS

Effective January 1, 1983

Original Coat Rates

Acct. *No.*	*Class or Subclass of Plant*	*Proj.* *Life* *(a)* (Yrs.)	*Net* *Salv.* *(b)* *(%)*	*Year* *0.0* *(c)* (%)	*Year* *0.5* *(d)* (%)	*Year* *1.5* *(e)* (%)	*Year* *2.5* *(f)* (%)	*Salv.* *Rate* *(g=-b/a)* (%)
212	Buildings	41	5	3.7	3.5	3.3	3.2	−0.1
261	Furniture & Office Equipment							
	Other	23	14	8.4	7.0	6.3	5.9	−0.6
	Computer & AMA Equipment	6.4	19	19.0	18.1	17.1	16.1	−3.0
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.6	6	15.2	14.7	14.2	13.8	−0.8
	Other Work Equipment	10.9	−2	16.5	13.5	11.8	10.8	0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - NEW HAMPSHIRE

Effective January 1, 1983

Original Coat Rates

Acct. *No.*	*Class or Subclass of Plant*	*Proj.* *Life* *(a)* (Yrs.)	*Net* *Salv.* *(b)* *(%)*	*Year* *0.0* *(c)* (%)	*Year* *0.5* *(d)* (%)	*Year* *1.5* *(e)* (%)	*Year* *2.5* *(f)* (%)	*Salv.* *Rate* *(g=-b/a)* (%)
212	Buildings	44	2	3.4	3.2	3.1	3.0	0.
261	Furniture & Office Equipment							
	Other	25	9	7.9	6.6	6.0	5.6	−0.4
	Computer & AMA Equipment	6.1	15	20.0	18.9	17.8	16.8	−2.5
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.6	8	15.9	15.1	14.4	13.9	−1.1
	Other Work Equipment	11.4	0	15.9	13.0	11.4	10.4	0.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - RHODE ISLAND

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life* *(a)* (Yrs.)	*Net Salv.* *(b)* (%)	*Year* *0.0* *(c)* (%)	*0.5* *(d)* (%)	*1.5* *(e)* (%)	*2.5* *(f)* (%)	*Salv. Rate* *(g=-b/a)* (%)
212	Buildings	46	3	3.3	3.1	3.0	2.9	−0.1
261	Furniture & Office Equipment							
	Other	25	9	7.9	6.6	6.0	5.6	−0.4
	Computer & AMA Equipment	6.3	26	19.3	18.3	17.3	16.3	−4.1
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.7	7	15.2	14.5	14.0	13.6	−0.9
	Other Work Equipment	11.5	−2	15.8	12.9	11.3	10.3	0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - VERMONT

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life* *(a)* (Yrs.)	*Net Salv.* *(b)* (%)	*Year* *0.0* *(c)* (%)	*0.5* *(d)* (%)	*1.5* *(e)* (%)	*2.5* *(f)* (%)	*Salv. Rate* *(g=-b/a)* (%)
212	Buildings	43	8	3.6	3.4	3.2	3.1	−0.2
261	Furniture & Office Equipment							
	Other	26	10	7.6	6.4	5.8	5.4	−0.4
	Computer & AMA Equipment	9.2	10	13.3	12.8	12.3	11.8	−1.1
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.5	6	16.2	15.2	14.5	13.9	−0.8
	Other Work Equipment	11.1	3	16.3	13.3	11.7	10.6	−0.3

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
NEW JERSEY BELL TELEPHONE COMPANY

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life* *(a)* (Yrs.)	*Net Salv.* *(b)* (%)	*Year* *0.0* *(c)* (%)	*0.5* *(d)* (%)	*1.5* *(e)* (%)	*2.5* *(f)* (%)	*Salv. Rate* *(g=-b/a)* (%)
212	Buildings	44	3	3.5	3.3	3.1	3.0	−0.1
261	Furniture & Office Equipment	21	0	8.8	7.6	6.8	6.4	0.
	Computer Equipment	7	3	15.8	15.2	14.9	14.6	−0.4
264	Vehicles & Other Work Equipment							
	Motor Vehicles	9.4	17	11.4	11.1	10.9	10.8	−1.8
	Other Work Equipment	12	0	18.1	12.9	10.6	9.4	0.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY IDAHO

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year*				*Salv. Rate (g=-b/a)* (%)
				0.0 (c) (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	
212	Buildings	43	5	3.6	3.3	3.2	3.1	−0.1
261	Furniture & Office Equipment	14.3	7	10.4	10.2	9.8	9.2	−0.5
	Computer & AMA Systems	6.1	9	24.8	21.9	19.0	16.8	−1.5
	Vehicles & Other Work Equipment	12	23	11.9	10.7	10.1	9.6	−1.9

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - OREGON

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year*				*Salv. Rate (g=-b/a)* (%)
				0.0 (c) (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	
212	Buildings	40	1	3.8	3.6	3.4	3.3	0.
261	Furniture & Office Equipment	16.1	14	11.3	10.2	9.3	8.5	−0.9
	Computer & AMA Systems	6.8	10	22.3	19.9	17.5	15.6	−1.5
	Vehicles & Other Work Equipment	11.2	17	12.5	11.3	10.6	10.0	−1.5

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - WASHINGTON

Effective January 1, 1983

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year*				*Salv. Rate (g=-b/a)* (%)
				0.0 (c) (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	
212	Buildings	43	5	3.5	3.3	3.2	3.1	−0.1
261	Furniture & Office Equipment	14.3	7	10.4	10.2	9.8	9.2	−0.5
	Computer & AMA Systems	6.1	9	24.8	21.9	19.0	16.8	−1.5
	Vehicles & Other Work Equipment	11.2	23	12.2	10.7	11.2	10.6	−2.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Proj. Life* *(a)* (Yrs.)	*Net Salv.* *(b)* (%)	*Original Coat Rates* *Year* 0.0 *(c)* (%)	0.5 *(d)* (%)	1.5 *(e)* (%)	2.5 *(f)* (%)	*Salv. Rate* *(g=-b/a)* (%)
212	Buildings	44	9	3.5	3.3	3.1	3.0	−0.2
261	Furniture & Office Equipment							
	Storeroom & Other	25	2	7.9	7.0	6.5	6.1	−0.1
	Computer & AMA Systems	8.3	1	14.8	14.7	14.4	13.6	−0.1
	Vehicles & Other Work Equipment	13.5	15	11.4	9.8	9.0	8.6	−1.1

FCC 83-592

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for:

General Telephone Company of Florida
General Telephone Company of Indiana, Inc.
General Telephone Company of Michigan
General Telephone Company of the Northwest, Inc.
General Telephone Company of Ohio
General Telephone Company of the Southeast
Hawaiian Telephone Company

ORDER

(Adopted: December 14, 1983; Released: December 20, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *INTRODUCTION*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of the classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe revised percentages of depreciation (depreciation rates) for the seven GTE companies listed above using the straight line equal life group (SLELG) method.

II. *BACKGROUND*

A. *Straight Line Equal Life Group Method*

2. In *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), we amended our rules to permit the use of the SLELG depreciation method for new additions to plant as an alternative to the straight line vintage group (SLVG) method, provided that adequate data are available for the

proper application of the method. The primary differences between the SLELG and SLVG methods lie in the definition of the basic depreciation groups and in the approach each takes in spreading the original cost of assets comprising the basic groups over their estimated average service lives. While SLVG forms its basic groups by combining all units placed in service in one year (i.e., a vintage group), SLELG creates its basic groups by combining all units within each vintage group which share an equal life expectancy (i.e., an equal life group). While the SLVG method is designed to depreciate 100% of the original cost of a vintage on average over the life cycle of each vintage, the SLELG method is designed to depreciate 100% of the original cost of each plant unit over its life. As a consequence, if projections are accurate, the SLELG method should allow for depreciation at a rate more representative of the actual consumption of units of property than SLVG. We concluded in Docket No. 20188 that the proper application and monitoring of this method would not only enhance the carriers' cash flow and present to all interested parties a more accurate and objective financial picture of the carriers' operations and capital requirements, but would also benefit their customers by encouraging innovation and the introduction of new technology.

3. Under both the SLVG and SLELG methods, retirement projections, service life estimates, and depreciation rates are normally determined, in part, through the use of survivor curves. These survivor curves define the relationship between the age of plant investment and the relative percentage expected to remain in service. Under the SLELG methodology, the survivor curves assume an added significance—that of defining the basic (equal life) groups. Under the SLVG method, most survivor curves are selected only after the staff has completed detailed statistical analysis of historical retirement data. With the added significance of the survivor curves in the SLELG method, the availability and analysis of historical retirement data become even more important.

4. We recognized the importance of adequate data in Docket No. 20188 where we found that the SLELG method is acceptable, provided that it is assured that adequate data is available for proper application of the method; that record keeping and reporting practices will enable monitoring of the reasonableness of the rate of allocation of both original cost and provisions for salvage and removal; and that such allocation of original cost will achieve allocation over the service life of the property neither more nor less than 100% of the investment net of salvage value.[1] Accordingly, we directed the staff to take such measures as may be necessary to ensure the measurability and accountability of the results under the SLELG method.

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[1] Property Depreciation, 83 FCC 2d at 283.

5. We further directed the staff to phase in the implementation of SLELG depreciation rates beginning with the outside plant accounts, followed by the central office equipment and all other plant accounts. In accordance with this directive, during the past two years the staff reviewed SLELG rates for the outside plant accounts for the FCC-subject GTE companies. As a result of that review, we adopted SLELG rates for new additions to the outside plant accounts for all of the GTE companies in *Depreciation Rates*, 88 FCC 2d 1567 (1982), 90 FCC 2d 997 (1982) and 92 FCC 2d 978 (1982). In 1982 the staff also reviewed SLELG rates for the central office equipment accounts for the FCC-subject GTE companies. As a result, we adopted SLELG rates for new additions to most of the central office equipment accounts for all of the GTE companies in *Depreciation Rates*, 92 FCC 2d 712 (1982) and 92 FCC 2d 978.

6. This year the staff reviewed SLELG rates for the buildings and general equipment accounts (i.e., furniture, computers, motor vehicles and other work equipment) for eight GTE companies—three of which requested SLELG rates for the buildings account only. One of these companies was regularly scheduled for a complete review of depreciation rates this year. SLELG rates for this company are under consideration in another order adopted by the Commission today (see FCC 83–588, released December 20, 1983). Our findings and conclusions regarding the SLELG rates for the remaining seven GTE companies are discussed below.

B. *Review Procedures*

7. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a carrier only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed revisions to the life and salvage factors.

(3) Independent staff analysis of such information as the carrier's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the carrier's filings and the preliminary Commission staff proposals at a conference in which representatives of the carrier and the staffs of the respective state commissions and the FCC participate (i.e., a three-way meeting.)

8. During the past year, in addition to the filings in conjunction with the staff's normal triennial review cycle, we received additional studies: SLELG studies for the buildings and general equipment

accounts for 15 telephone companies, studies for 22 regional interexchange corporations in accordance with divestiture,[2] and annual update studies for the electromechanical equipment accounts for six telephone companies. The need to resolve the issues raised by all these filings in a timely manner required the staff to depart from its traditional procedures. Because it was apparent that there were insufficient staff resources to allow the complete review of life and salvage factors for the carriers requesting SLELG rates, the staff chose to omit portions of steps 2 and 3 above and instead to use the life and salvage factors which underlie currently prescribed rates. In addition, time and resource constraints precluded the discussion of SLELG rates with the carriers and respective state commissions at three-way meetings (i.e., step 5). Instead, comments regarding the carrier filings and preliminary staff proposals were solicited from the carriers and respective state commissions through correspondence and telephone conversations.

9. On August 29 and 30, 1983 the staff sent review letters to the GTE companies and the respective state commissions outlining its assessment of the GTE companies' SLELG filings and the staff's own initial recommendation for SLELG rates. Comments were solicited from the carriers and the respective state commissions regarding the carrier and the FCC staff recommendations. Written comments were received from nine parties. The staff analyzed these comments, and on September 30, 1983, issued a Public Notice (Report No. 6837) entitled, "Depreciation Rate Prescriptions Proposed For Domestic Telephone Companies-Notice Of Opportunity For Comment." This Public Notice summarized the FCC staff's proposals for revised depreciation rates and the change in depreciation expense that would result if those proposed depreciation rates were approved. On October 3, 1983 the staff transmitted to each company and respective state commission a copy of the September 30 Public Notice and schedules containing the proposed SLELG rates.

III. *SUMMARY OF COMMENTS*

A. *August 29 and 30, 1983 Review Letters*

10. Comments to the staff's review letters of August 29 and 30, 1983 were received from seven GTE companies and two state commissions.[3] All of the GTE companies accepted the FCC staff's proposals for the buildings and general equipment accounts. The

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[2] These corporations are being established in accordance with the reorganization plan of AT&T which was approved by the court in United States v. American Telephone and Telegraph Co., 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 103 S.Ct. 1240 (1983).

[3] Comments were received from GTE of Florida, GTE of Indiana, GTE of Michigan, GTE of the Northwest, GTE of Ohio, GTE of the Southeast, Hawaiian Telephone and the state commissions of Florida and Michigan.

Florida Commission stated that it remained unconvinced that inclusion of the SLELG concept into the depreciation formula without supportive record-keeping is a step toward accuracy of recovery, or that SLELG as normally conceived is desirable or broadly practicable. The Florida Commission also stated that while subscribing to the standard of timely recovery of investments, it is of the opinion that there may be mechanisms more appropriate and/or practicable than SLELG. The Michigan Commission stated that until an order is issued revising depreciation rates, General Telephone of Michigan is authorized to use only those depreciation rates specifically stated in Michigan Public Service Commission Case No. U-5548.

B. *September 30, 1983 Public Notice*

11. Responses to the staff's September 30, 1983 Public Notice were received from the state commissions of Florida, Michigan and Ohio. The Florida Commission staff stated that its Commission has not accepted the SLELG methodology, though a provision for a company to propose this type methodology appears in its depreciation rules. The state staff remains concerned over possible inequities between companies due to the expenses and difficulties of maintaining the necessary data base and mortality details for SLELG. The Michigan Commission stated that GTE of Michigan may not implement SLELG until the state commission issues a further order permitting the use of the methodology.

12. The Ohio Commission staff agreed that the SLELG method does reflect better matching of capital consumption as opposed to the SLVG method. However, the staff objected to the FCC staff's SLELG rate proposals because the FCC staff employed projection life, future net salvage estimates and Gompertz-Makeham curves in determining those proposals. The Ohio Commission staff stated that the proper parameters for the development of SLELG rates are the average service life, the average net salvage and Iowa curves.

IV. DISCUSSION

A. *Use of SLELG*

13. In our decision in Docket No. 20188, we considered the arguments expressed by the parties for and against the use of the SLELG method and determined that the use of SLELG rates is appropriate provided adequate data are available. In the discussion in the *Report and Order*, 93 FCC 2d 267, we found that the use of SLELG comports with the mandate of Section 1 of the Communications Act, "to make available . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." 47 U.S.C. §151. We reaffirmed our decision allowing the use of SLELG in our *Order on Reconsider-*

ation, 87 FCC 2d 916, as well as in prescription orders approved in 1982. *See* para. 5, *supra*. Nevertheless, whether the use of SLELG rates is warranted is still questioned by the Florida and Michigan commissions. Inasmuch as neither the Florida nor Michigan commission provided new arguments or evidence regarding the use of SLELG rates, we have no basis upon which to reconsider our decision on this matter. Our rules, as amended in Docket No. 20188, clearly allow the use of SLELG for accounts in which adequate data are available to apply and monitor its use properly.

14. We recognize the concern of the Florida Commission staff about monitoring SLELG rates, and we wish to maintain the good working relationship our staff has developed with commission staffs over the years. Toward this end we direct our staff to continue to cooperate with the state commissions. We are willing, to the extent which our resource constraints allow, to provide our computer programs and other aid which may facilitate the implementation and the monitoring of the SLELG procedure.

B. *Preemption of States*

15. The Michigan Commission stated that GTE of Michigan may not implement SLELG until it issues a further order permitting the use of the methodology. In Docket No. CC 79–105, *Amendment of Part 31*, 92 FCC 2d 864 (1982), *appeal pending sub nom. Virginia State Corporation Commission v. FCC*, Civ. No. 83–1136 (4th Cir., filed February 11, 1983), we considered whether a state commission could require a company to use depreciation rates other than those prescribed by the FCC. We concluded that the most logical and reasonable interpretation of Section 220(b) of the Act is that state commissions are precluded from departing from the depreciation rates and methods prescribed by this Commission. The Virginia State Corporation Commission has filed an appeal in the Fourth Circuit Court of Appeals seeking to reverse the FCC's preemption of the states in matters of intrastate depreciation. The pendency of an appeal does not affect the enforceability of a Commission decision absent the issuance of a stay order. *See, e.g., Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland*, C.A. No. N83–855 (D) Md. April 7, 1983); *Pacific Northwest Telephone Company v. Washington Utilities and Transportation Commission*, No. C83–2140 (W.D. Wash. March 10, 1983); *Southwestern Bell Telephone Company v. State Corporation of Kansas*, No. 83–4090 (D. Kan. April 8, 1983). Accordingly, the Michigan Commission may not require GTE of Michigan to use depreciation rates other than those prescribed in this order.

C. *Life and Salvage Factors*

16. The Ohio Commission objected to the use of the projection life table (PLT) in the calculation of SLELG depreciation rates.

Instead, it contended that the average service life (ASL) should be used. The PLT underlying the currently prescribed rate is designed for use in forecasting future mortality of both new as well as embedded assets.[4] On the other hand, the ASL underlying the currently prescribed depreciation rate is the composite of the average life of assets already retired and the forecasted average life of assets in service as of the last study. If the ASL were used, we would be assuming that new assets will have the identical life characteristics of embedded and previously retired assets. We find this assumption unacceptable. Inasmuch as we are prescribing SLELG rates for new assets only, we find that the PLT is the preferred parameter to use. It should be noted that not all accounts have been studied using PLTs. For these accounts, alternative parameters have been used.

17. The Ohio Commission also objected to the use of the future net salvage in the calculation of SLELG depreciation rates. Instead, it contended that we should use the average net salvage. Here, too, we are prescribing SLELG rates for new assets only; accordingly, the future net salvage is the preferred parameter to use in determining the net salvage segment of the SLELG rate.[5]

18. Additionally, the Ohio Commission objected to the FCC staff's and GTE of Ohio's use of curves derived from the Gompertz-Makeham analysis in arriving at SLELG depreciation rates for GTE of Ohio. It contended that we should use Iowa curves.[6] The Gompertz-Makeham analysis has been used extensively in developing projection life tables by the FCC staff and most telephone companies which the FCC staff have reviewed for the last 30 years. We know of no evidence demonstrating that the use of one of these procedures leads to a depreciation rate appreciably different from that which wold result from the use of the other procedure. In fact, the adequacy of both methods is well documented in various literature on depreciation. For example, in NARUC's *Public Utility Depreciation Practices* both Gompertz-Makeham and Iowa curves are two of several methods discussed for use in the mathematical curve fitting of observed retirement data. NARUC does not, however, give a preference of one method over the other method. Furthermore, the Ohio Commission provided no evidence to support its contention that Iowa curves should be used. We believe that both methods have

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[4] To forecast future mortality of new assets, the entire PLT is used; to forecast future mortality of embedded assets, the PLT beyond the age of the assets being considered is used.

[5] In certain instances the use of the average net salvage may be appropriate, e.g., when there is a strong, well-defined relationship between the age of retirements and net salvage. However, this is not the case for the accounts studied here. This issue is discussed more fully in *Depreciation Rates*, 90 FCC 2d 964 (1982).

[6] The Iowa Type Survivor Curves were developed by the Engineering Research Institute, Iowa State University. These curves, commonly referred to as Iowa curves, are used extensively in describing retirement dispersion for utility plant.

merit if properly applied, and we have no preference for one over the other. The staff has developed the computer software to support the use of both methods; therefore, either method can be administered adequately. Consequently, we have no objections to a company using either method at this time. Inasmuch as both methods are generally accepted, we can see no need to require GTE of Ohio to use Iowa curves.

D. *Conclusion*

19. Having considered the responses to the staff's review letters and public notices, the recommendations of the staff, and the proposals of the companies, we find the resulting SLELG rates listed in the Appendix to be in the public interest.

20. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment: Appendix

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF FLORIDA

Effective January 1, 1984

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life*	*Net Salv.*	*Year*				*Salv. Rate*
		(a) (Yrs.)	*(b)* (%)	*0.0* *(c)* (%)	*0.5* *(d)* (%)	*1.5* *(e)* (%)	*2.5* *(f)* (%)	*(g=-b/a)* (%)
212	Buildings	40	0	3.9	3.5	3.3	3.2	0.
261	Furniture & Office Equipment	16	1	14.8	11.1	9.3	8.3	−0.1
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.4	25	16.3	15.2	14.6	13.9	−3.4
	Shop Equipment	19	5	8.0	7.0	6.5	6.2	−0.3
	Tools and Work Equipment	13	3	18.2	13.0	10.6	9.4	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF INDIANA, INCORPORATED

Effective January 1, 1984

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life*	*Net Salv.*	*Year*				*Salv. Rate*
		(a) (Yrs.)	*(b)* (%)	*0.0* *(c)* (%)	*0.5* *(d)* (%)	*1.5* *(e)* (%)	*2.5* *(f)* (%)	*(g=-b/a)* (%)
261	Furniture & Office Equipment	18	4	7.1	7.0	6.9	6.8	−0.2
264	Vehicles & Other Work Equipment							
	Motor Vehicles	9.2	8	11.9	11.7	11.6	11.4	−0.9
	AirCraft	7.5	65	13.3	13.3	13.3	13.3	−8.7
	Shop Equipment	20	7	6.4	6.3	6.3	6.1	−0.4
	Tools and Work Equipment	20	18	6.4	6.3	6.3	6.1	−0.9

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF MICHIGAN

Effective January 1, 1984

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life*	*Net Salv.*	*Year*				*Salv. Rate*
		(a) (Yrs.)	*(b)* (%)	*0.0* *(c)* (%)	*0.5* *(d)* (%)	*1.5* *(e)* (%)	*2.5* *(f)* (%)	*(g=-b/a)* (%)
261	Furniture & Office Equipment	20	5	7.4	6.6	6.2	6.0	−0.3
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8	10	17.0	14.2	13.0	12.4	−1.3
	Tools and Work Equipment	12	7	10.6	10.5	10.2	9.8	−0.6
	Aircraft	6	40	16.7	16.7	16.7	16.7	−6.7

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INCORPORATED - IDAHO

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Original Coat Rates* *Year* *0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	32	9	4.8	4.3	4.1	3.9	−0.3
261	Furniture & Office Equipment							
	Furniture	20	5	7.4	6.6	6.2	6.0	−0.3
	Machines	12	5	11.9	10.6	9.9	9.4	−0.4
	Data Processing Computers	7	10	21.9	19.6	17.4	15.4	−1.4
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.8	14	14.6	14.5	14.3	13.8	−1.8
	Shop Equipment	20	1	5.9	5.8	5.7	5.6	−0.1
	Tools & Other Work Equipment	15	3	8.5	8.4	8.2	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INCORPORATED - MONTANA

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Original Coat Rates* *Year* *0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	30	9	5.1	4.6	4.3	4.2	−0.3
261	Furniture & Office Equipment							
	Furniture	20	5	7.4	6.6	6.2	6.0	−0.3
	Machines	12	5	11.9	10.6	9.9	9.4	−0.4
	Data Processing Computers	7	10	21.9	19.6	17.4	15.4	−1.4
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.8	14	14.6	14.5	14.3	13.8	−1.8
	Shop Equipment	20	1	5.9	5.8	5.7	5.6	−0.1
	Tools & Other Work Equipment	15	3	8.5	8.4	8.2	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INCORPORATED - OREGON

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Original Coat Rates* *Year* *0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	37	13	4.2	3.8	3.6	3.4	−0.4
261	Furniture & Office Equipment							
	Furniture	20	5	7.4	6.6	6.2	6.0	−0.3
	Machines	12	5	11.9	10.6	9.9	9.4	−0.4
	Data Processing Computers	7	10	21.9	19.6	17.4	15.4	−1.4
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.8	14	14.6	14.5	14.3	13.8	−1.8
	Shop Equipment	20	1	5.9	5.8	5.7	5.6	−0.1
	Tools & Other Work Equipment	15	3	8.5	8.4	8.2	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INCORPORATED - WASHINGTON

Effective January 1, 1984

Acct. No.	Class or Subclass of Plant	Proj. Life (a) (Yrs.)	Net Salv. (b) (%)	*Original Coat Rates* Year 0.0 (c) (%)	0.5 (d) (%)	1.5 (e) (%)	2.5 (f) (%)	Salv. Rate (g=-b/a) (%)
212	Buildings	36	14	4.3	3.9	3.6	3.5	−0.4
261	Furniture & Office Equipment							
	Furniture	20	5	7.4	6.6	6.2	6.0	−0.3
	Machines	12	5	11.9	10.6	9.9	9.4	−0.4
	Data Processing Computers	7	10	21.9	19.6	17.4	15.4	−1.4
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.8	14	14.6	14.5	14.3	13.8	−1.8
	Shop Equipment	20	1	5.9	5.8	5.7	5.6	−0.1
	Tools & Other Work Equipment	15	3	8.5	8.4	8.2	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INCORPORATED - GENERAL PLANT

Effective January 1, 1984

Acct. No.	Class or Subclass of Plant	Proj. Life (a) (Yrs.)	Net Salv. (b) (%)	*Original Coat Rates* Year 0.0 (c) (%)	0.5 (d) (%)	1.5 (e) (%)	2.5 (f) (%)	Salv. Rate (g=-b/a) (%)
212	Buildings	45	14	3.5	3.1	3.0	2.9	−0.3
261	Furniture & Office Equipment							
	Furniture	20	5	7.4	6.6	6.2	6.0	−0.3
	Machines	12	5	11.9	10.6	9.9	9.4	−0.4
	Data Processing Computers	7	10	21.9	19.6	17.4	15.4	−1.4
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7.8	14	14.6	14.5	14.3	13.8	−1.8
	Shop Equipment	20	1	5.9	5.8	5.7	5.6	−0.1
	Tools & Other Work Equipment	15	3	8.5	8.4	8.2	8.0	−0.2

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF OHIO

Effective January 1, 1984

Acct. No.	Class or Subclass of Plant	Proj. Life (a) (Yrs.)	Net Salv. (b) (%)	*Original Coat Rates* Year 0.0 (c) (%)	0.5 (d) (%)	1.5 (e) (%)	2.5 (f) (%)	Salv. Rate (g=-b/a) (%)
261	Furniture & Office Equipment	25	12	4.7	4.6	4.6	4.5	−0.5
264	Vehicles & Other Work Equipment							
	Motor Vehicles	7	13	18.1	16.6	15.6	14.7	−1.9
	Shop Equipment	10	5	12.7	12.5	12.0	11.5	−0.5
	Tools & Other Work Equipment	18	11	7.1	7.0	6.9	6.8	−0.6

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST - ALABAMA

Effective January 1, 1984

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year* *0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	40	10	3.9	3.5	3.3	3.2	−0.3
261	Furniture & Office Equipment	19	1	7.5	7.5	7.4	7.1	−0.1
264	Vehicles & Other Work Equipment							
	Motor Vehicles	8	12	15.7	15.7	15.5	14.7	−1.5
	Vehicle Shop Equipment	15	2	7.8	7.6	7.5	7.5	−0.1
	Tools & Other Work Equipment	20	2	8.0	7.5	7.1	6.8	−0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST - NORTH CAROLINA

Effective January 1, 1984

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year* *0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	43	10	3.6	3.3	3.1	3.0	−0.2
261	Furniture & Office Equipment	16	10	9.0	8.2	7.8	7.4	−0.6
264	Vehicles & Other Work Equipment							
	Motor Vehicles	9	19	13.1	13.1	13.1	12.9	−2.1
	Aircraft	11	60	9.7	9.6	9.6	−5.5	
	Vehicle Shop Equipment	15	5	7.8	7.6	7.5	7.4	−0.3
	Tools & Equipment	20	2	8.0	7.5	7.1	6.8	−0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST - TENNESSEE

Effective January 1, 1984

Original Coat Rates

Acct. No.	*Class or Subclass of Plant*	*Proj. Life (a)* (Yrs.)	*Net Salv. (b)* (%)	*Year* *0.0 (c)* (%)	*0.5 (d)* (%)	*1.5 (e)* (%)	*2.5 (f)* (%)	*Salv. Rate (g=-b/a)* (%)
212	Buildings	42	10	3.7	3.3	3.2	3.1	−0.2
261	Furniture & Office Equipment	20	2	7.4	6.6	6.2	6.0	−0.1
264	Vehicles & Other Work Equipment							
	Motor Vehicles	9	17	14.2	14.2	14.1	13.5	−1.9
	Vehicle Shop Equipment	15	3	7.8	7.6	7.5	7.4	−0.2
	Tools & Equipment	20	2	8.0	7.5	7.1	6.8	−0.1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
HAWAIIAN TELEPHONE COMPANY

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Proj. Life* (a) (Yrs.)	*Net Salv.* (b) (%)	*Original Cost Rates* *Year* *0.0* (c) (%)	*0.5* (d) (%)	*1.5* (e) (%)	*2.5* (f) (%)	*Salv. Rate* (g=-b/a) (%)
212	Buildings	45	−1	3.5	3.1	3.0	2.9	0.
261	Furniture & Office Equipment	11.4	14	11.1	10.6	10.3	10.0	−1.2
264	Vehicles & Other Work Equipment							
	Motor Vehicles	9.5	18	11.3	11.3	11.3	11.2	−1.9
	Shop Equipment	15	0	8.5	8.4	8.2	8.0	0.
	Tools & Other Work Equipment	13	5	9.8	9.7	9.4	9.1	−0.4

Depreciation Rate

Commission approved modified depreciation rates for six domestic telephone companies consisting of five Bell operating companies and the Continental Telephone Company of New York. These rates are based upon the straight line remaining-life procedure approved by the Commission in its *Report and Order* in Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration,* 87 FCC 2d 916 (1981).
-Depreciation Rates

FCC 83–607

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Percentages
of Depreciation pursuant to Section 220(b)
of the Communications Act of 1934, as
amended for:

Bell Telephone Company of Nevada
Continental Telephone Company of New
York Illinois Bell Telephone Company
New Jersey Bell Telephone Company
Pacific Northwest Bell Telephone
Company The Pacific Telephone and
Telegraph Company

ORDER

(Adopted: December 22, 1983; Released: December 27, 1983)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

I. *INTRODUCTION*

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of the classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed. By this order we prescribe revised percentages of depreciation (depreciation rates) for the six telephone companies listed above using the straight line vintage group remaining life (remaining-life) procedure.

II. *BACKGROUND*

A. *Straight Line Depreciation*

2. Prior to 1981, we had only used the straight line vintage group whole-life (whole-life) depreciation procedure in prescribing depreciation rates for telephone company plant. Using this procedure, we determined the depreciation accruals applicable to each year's operations using current estimates of life and net salvage. As estimates of life and net salvage changed over time, the whole-life rates were changed in accordance with these changes in estimates. However, the whole-life procedure did not permit rate adjustments for reserve deficits or surpluses which resulted from the cumulative over- or under-estimation of life and net salvage factors. In our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), we revised Part 31 of the Rules and Regulations, the "Uniform System of Accounts for Class A and B Telephone Companies," to allow the use of the remaining-life depreciation procedure. The remaining-life procedure is designed to distribute the unrecovered cost (original cost less the sum of the depreciation reserve and future net salvage) of a group of assets over its estimated average life expectancy. Inherent in the remaining-life procedure is an allocation of any reserve deficit or surplus over the estimated average remaining life.

3. We began implementation of the remaining-life method with the adoption of rates for the companies regularly scheduled for review in 1981. Implementation continued with the 1982 review and was completed with the adoption of remaining-life rates for various companies earlier this month.

4. In Docket No. 20188, we also amended our rules to permit the use of the straight line equal life group (SLELG) depreciation method for new additions to plant as an alternative to the straight-line vintage group procedure, provided that adequate data is available for the proper application of the method, and provided record keeping and reporting practices will enable monitoring of the expense allocation. We began implementation of the SLELG method with the adoption of rates for the outside plant and central office equipment accounts in 1982 and completed it with the adoption of rates for the buildings and general equipment accounts earlier this month.

5. In our 1982 SLELG orders (*Depreciation Rates*, 92 FCC 2d 693 (1982) and 92 FCC 2d 728 (1982)) we stated that SLELG rates should not be used to depreciate the new investments in certain dying accounts (e.g., electromechanical switching equipment) because projection life tables can not be determined with the degree of accuracy necessary in order to apply the method properly. As an alternative to the use of SLELG rates for new investments in these accounts, we directed the staff to update the remaining-life rates annually as requested by the companies or as deemed necessary by

the staff. The six carriers listed in the caption of this order filed for annual updates for these accounts.

B. *Review Procedures*

6. Inasmuch as the rates under consideration here are based upon updates of rates now in effect rather than complete reviews of new, detailed studies, much of the time and effort normally expended in a review was not required here. Furthermore, because of the other filings which were required to be resolved during the year,[1] the staff was unable to meet with each of the carriers and state commissions to discuss and resolve all the points of contention prior to recommending rates.[2] Instead, the proposals of the various parties were discussed in correspondence and telephone conversations.

7. In September 1983, our staff sent review letters to the six companies and the respective state commissions outlining its preliminary assessment of the companies' remaining-life rate requests and its own recommendations for updated remaining-life rates. Comments were solicited from the carriers and the respective state commissions regarding the carrier and FCC staff recommendations. In early October the carriers filed for remaining-life rates for the accounts given in the Appendix to this order. Our staff then analyzed the companies' filings and arrived at its recommendations. On October 11, 1983, our staff issued a public notice entitled, "Depreciation Rate Prescriptions Proposed For Domestic Telephone Companies." This Public Notice summarized the FCC staff's proposals for revised depreciation rates and the change in depreciation expense that would result if those proposed depreciation rates were approved. On October 13, 1983, our staff transmitted to each company and respective state commission a copy of the October 11 Public Notice.

III. *DISCUSSION OF ISSUES*

8. Responses to the Public Notice were received from four parties: Michigan Bell Telephone Company, New Jersey Board of Public Utilities, Pacific Telephone and Telegraph Company and the Public Utility Commissioner of Oregon. This is the third consecutive year in which we have addressed the general issues raised by our depreciation represcriptions. Accordingly, we do not here address in detail every issue raised by every commenter. We focus instead on those issues that have not been raised previously and on those that

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[1] During 1983 our staff reviewed all depreciation rates for the twelve carriers regularly scheduled for review. In addition it reviewed SLELG filings for the buildings and general use equipment accounts for sixteen carriers, and filings from each of AT&T's twenty-two newly formed regional interexchange corporations, which will primarily provide inter-LATA, interstate toll service.

[2] Normally, depreciation issues are considered and resolved in meetings among the FCC staff, the telephone company and the staff of the state commission having jurisdiction over the telephone company.

affect the six companies specifically, as opposed to depreciation rates generally.[3]

9. Both Michigan Bell and Pacific Telephone stated that complete reviews of equipment life and salvage factors and rates, as opposed to updates of rates now in effect, should be conducted annually. We do not agree that life and salvage factors are changing so rapidly that annual consideration is routinely required. In fact, the remaining-life method is designed to include a true-up component to deal with variations in life and changes between represcriptions. We believe that the periodic, detailed study of rates (i.e., every three years) coupled with annual updates and the use of the remaining-life method will result in timely capital recovery in all but the most extreme circumstances.[4] To assure full and timely capital recovery, we direct the staff to perform annual updates of rates as requested by the companies or as deemed necessary by the staff.

10. Pacific Telephone proposes that rates be based upon prospective instead of retrospective studies. The issue of prospective versus retrospective studies here does not refer to whether life estimates are based upon historical mortality data instead of company plans and other factors affecting future mortality. Rather, it refers to the selection of a future study date as opposed to one in the recent past. The staff has examined the use of future study dates and determined that, in general, their use is unacceptable, especially in conjunction with the use of remaining-life procedures. For example, the use of remaining-life studies requires the determination of the book reserve ratio. With the selection of a future study date both the future plant balance and reserve balance would have to be estimated. Staff studies have shown that companies cannot normally project either figure with precision. Thus, the book reserve ratio and the resulting remaining-life depreciation rate determined for a future period are generally imprecise.[5] We agree with the staff that, as a general rule, future study dates should not be selected.

11. Bell of Nevada's crossbar investment was studied in two

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[3] For example, New Jersey objects to this Commission's preemption of state authority over depreciation rates. *See Amendment of Part 31*, 92 FCC 2d 864 (1982), *appeal pending sub nom.* Virginia State Corporation Commission v. FCC, Civ. No. 83–1136 (4th Cir. filed February 11, 1983). This is not the proper forum to reargue the preemption issue, and the pendency of an appeal does not affect the enforceability of our decision absent the issuance of a stay order. *See, e.g.*, Chesapeake and Potomac Telephone Company of Maryland v. Public Service Commission of Maryland, C.A. No. N83–855 (D. Md. April 7, 1983). The state commissions are required to use the depreciation rates prescribed here for state ratemaking purposes.

[4] Nothing in our Rules prevents a company from keeping us informed of extraordinary situations that could justify depreciation reviews outside the normal triennial represcription process.

[5] All telephone companies for which depreciation rates are prescribed provide

parts: (1) the Gabbs central office; and (2) all other central offices. The Gabbs investment was studied separately because it is located in a small remote community, while the remainder of the crossbar investment is concentrated in the Reno area. The use of standard remaining-life procedures is recommended for the Gabbs investment. For the remainder of the account, however, the current reserve level and expected average remaining life are such that the application of standard remaining-life procedures would result in a depreciation rate in excess of 100%.[6] As we decided in our represcription orders adopted earlier this month, in such circumstances, an amortization period should be selected to write off the net book cost in equal annual amounts.[7] We further stated that the amortization period should be selected after consideration of our policy of writing-off the investment in a timely manner while not overly distorting the income statement of any period. After consultation, the three parties (i.e., the Company and the staffs of the Nevada Commission and the FCC) agreed that a three year amortization period will suffice here. We find this amortization period to be consistent with our stated policy. As a result, we adopt the staff recommendation.

12. In December 1982 when we last prescribed rates for Bell of Nevada (*see Depreciation Rates*, 92 FCC 2d 920 (1982)), we had not considered alternative solutions to reserve problems such as this. As a result of our review, we prescribed a remaining-life rate of 59.4%, knowing that the rate for this account could become volatile as actual retirements deviated even slightly from projected retirements. After considering the situation, we are convinced that the 59.4% rate that was ordered to go into effect on January 1, 1983 should not go into effect at all. Rather, the solution offered in paragraph 11 above should be implemented effective July 1, 1983. This would be consistent with the rate treatment proposed by the state and help to ensure the full recovery of capital for this account.

13. Oregon disagreed with the FCC staff proposal for Pacific Northwest Bell's COE-Crossbar Account because it includes offices which are scheduled to be transferred to AT&T Communications of The Pacific Northwest, Inc. on January 1, 1984. Oregon states that the offices being transferred have remaining lives shorter than the account average, and, thus, with divestiture the average remaining-life for the remainder of the account will increase. We believe that there is merit to Oregon's proposal; however, the intent of the current proceeding was merely to update the Company's rates from January 1, 1982 study date to a January 1, 1983 study date. Clearly

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depreciation studies which include forecasted information. The staff has determined from these studies that actual vs. forecasted information, in most cases, is grossly inaccurate. Copies of these studies are available in the Bureau's offices.

[6] As of June 30, 1983, the book reserve ratio was -31% and the estimated average remaining-life was approximately 1 year.

[7] *See*, e.g., FCC 83–587, released December 20, 1983.

all equipment in service as of January 1, 1983, including those scheduled to be transferred to AT&T with divestiture, should be considered. Nevertheless, in the coming months we intend to consider depreciation rates for the crossbar investment being transferred to the AT&T regional interexchange corporation. At that time, to the extent necessary, we will also reconsider the post-divestiture situation for the crossbar investment remaining with Pacific Northwest Bell.

14. Having considered the responses to the staff's review letters and Public Notice, the recommendations of the staff, and the proposals of the companies, we find the resulting remaining-life rates listed in the Appendix to be appropriate rates to be applied, unless modified by further order of this Commission.

IV. *ORDERING CLAUSES*

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

16. IT IS FURTHER ORDERED, That the companies shall submit to the Commission whole-life as well as remaining-life depreciation studies during the next represcription period.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment: Appendix

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
BELL TELEPHONE COMPANY OF NEVADA

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Step-by-Step[1]	2.4	–9	2	44.6
	Crossbar - Gabbs[2]	7	–7	52.5	7.8
	Crossbar - Other[3]				

[1] Rate effective January 1, 1983.

[2] Rate effective July 1, 1983.

[3] The July 1, 1983 net book cost less the future net salvage estimate of –7% is to be amortized in equal amounts over a 3 year period.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CONTINENTAL TELEPHONE COMPANY OF UPSTATE NEW YORK, INCORPORATED

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Step-by-Step	3.3	10	58	9.7
	Switchboard	0.8	0	76.2	29.8
	Power	4.1	9	30	14.9
	Ticketing	1.8	3	33.2	35.4
243	Aerial Wire	6	–55	–10.1	27.5

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
ILLINOIS BELL TELEPHONE COMPANY

Effective January 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Step-by-Step	4.9	–7	10.1	19.8
	Crossbar	3.2	–7	55.9	16.0

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW JERSEY BELL TELEPHONE COMPANY

Effective January 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Step-by-Step	2.4	−11	47.1	26.6
	Crossbar	5.5	−6	35.3	12.9

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - OREGON

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Step-by-Step	4.2	−4	39.6	15.3
	Crossbar	4.7	2	6.5	19.5

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - WASHINGTON

Effective January 1, 1984

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Step-by-Step	5.5	−7	33.1	13.4
	Cross bar	5	−8	10.7	19.5

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

Effective January 1, 1983

Acct. No.	*Class or Subclass of Plant*	*Average Remaining Life* (Years)	*Future Net Salvage* (%)	*Depr. Reserve Ratio* (%)	*Remaining Life Rate* (%)
221	Central Office Equipment				
	Manual	3.2	−13	−11.6	38.9
	Step-by-Step	2.7	−5	31.6	27.2
	Cross bar	4.8	−4	23.9	16.7

Application, Denial
Frequency, Equitable Distribution of under 307(b)
Review by Review Board
White Area

Review Board affirmed ID and denied TV application for relocation of transmitter site. Loss of Grade B service to 9936 persons (white area) outweighed gains in first-thru-third service to 14,661 persons. CATV evidence not relevant to show mitigation in (white or gray) loss areas.
–*Elba Development Corp.*
BC Docket No. 82–763

FCC 84R–3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of ELBA DEVELOPMENT CORPORATION (KQTV-TV) St. Joseph, Missouri	BC Docket No. 82–763 File No. BPCT-801114KG
For a Construction Permit for a Major Change	

Appearances

John R. Feore, Jr. and *Christopher C. Smallwood*, on behalf of Elba Development Corporation; *Herbert D. Miller, Jr.*, on behalf of Taft Broadcasting Company; *John W. King*, on behalf of Meredith Corporation; *J. Richard Carr*, on behalf of Scripps-Howard Broadcasting Co. and The Hearst Corporation; *William J. Potts, Jr.*, on behalf of Topeka Television, Inc.; and *Stephen T. Yelverton* and *Charles E. Dziedzic*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: January 10, 1984: Released: January 16, 1984)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the application of Elba Development Corporation's (Elba) KQTV-TV for authority to modify its existing facilities by changing its transmitter site, increasing its antenna height above average terrain, and directionalizing the antenna of its Station KQTV-TV, Channel 2, St. Joseph, Missouri. By *Memoran-*

dum Opinion and Order (hereinafter *"Designation Order"*), 47 Fed. Reg. 53478, published November 26, 1982, Elba's application was designated for hearing on issues: (1) to determine what areas and populations would gain or lose service if the application were granted and the availability of other Grade B television service to those areas and populations; (2) to determine based on the evidence so adduced whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), a grant of the application would provide a fair, efficient and equitable distribution of radio service; and (3) to determine ultimately, based on the resolution of the preceding issues, whether the application should be granted. By *Initial Decision (I.D.)*, FCC 83D-51, released August 24, 1983, presiding Chief Administrative Law Judge Lenore G. Ehrig (ALJ) denied the Elba application after finding that, although 5,976 persons would gain their first predicted Grade B television service, 7,279 persons would gain a second service, 1,406 persons would gain a third service, 29,157 persons would gain a fourth service, 5,283 persons would gain a fifth service, and there would be a total net service gain to 465,286 persons, these gains were outweighed by the loss of their only predicted Grade B television service to 9,936 persons and by the insufficiency of any offsetting public interest considerations. *See I.D.*, paras. 6, 33, 37, 46–47.

2. The proceeding is now before the Review Board on exceptions filed September 23, 1983 by Elba (Elba Br.); "limited" exceptions filed jointly by Taft Broadcasting Company, Scripps-Howard Broadcasting Co., The Hearst Corporation, and Meredith Corporation (Joint Respondents; Jt. Br.); "limited" exceptions filed by the Mass Media Bureau (Med. Bur. Br.); a statement in support of the *I.D.* filed by Topeka Television, Inc.; and reply briefs filed October 14, 1983 by Elba (Elba Reply); the joint respondents (Jt. Reply); and the Bureau (Med. Bur. Reply). The Board has reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held December 16, 1983, and the hearing record. We adopt the findings of fact in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that the Elba application must be denied.

SERVICE GAINS AND LOSSES

3. Elba challenges the ALJ's denial of its application and argues that the *I.D.* failed to properly weigh its claim of public interest benefits or its evidence purporting to show alternative sources of video programming in the putative loss area. It also asserts that a denial to it is inconsistent with Commission precedent, most particularly *KOTV, Inc.*, FCC 82D-54, released July 27, 1982 (ALJ), *appeal dismissed*, FCC 82R-72, released December 7, 1982 (Rev. Bd.)

and *KTVO, Inc.*, FCC 83D-32, released June 20, 1983 (ALJ) (Kirksville, Missouri).[1] Seeking affirmation of the *I.D.* (along with the respondent broadcast parties, Taft Broadcasting Co. *et al.*) is the Commission's Mass Media Bureau (hereinafter "Media Bureau"). While supporting the *I.D.* on its appreciation of the Commission's general policy principles, the Media Bureau specifically excepts to the ALJ's consideration of Elba's evidence relating to purported CATV service in the projected loss area.[2]

4. Insofar as its position on general policy grounds, the Media Bureau argues—exactly as it did in the recently-decided *KTVO* (*see supra* note 1)—that a tower relocation that would create more than a *"de minimis"* white area (*i.e.*, an area without any predicted Grade B television service) must be justified by a "compelling public interest" reason. It again cites *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964) for the proposition that "[o]nce in operation, a station assumes an obligation to maintain service to its viewing audience . . .,"[3] and submits[4]:

> . . . the Commission's policy is that a tower relocation will not be allowed, where there is more than a *de minimis* loss of service, unless *compelling* public interest considerations *necessitate* the move. Such considerations generally involve technical problems, serious financial problems, or other *matters beyond the control of the licensee.*

It explains its general policy opposition to relocation requests such as Elba's by stating[5]:

> Clearly, as noted previously, without such a strict policy against tower relocations and loss of service, licensees would engage in contour creep toward more lucrative metropolitan television markets, to the detriment of rural Americans.

5. In the recently-decided *KTVO* case, we affirmed the ALJ's grant of a transmitter relocation application and addressed many of the identical policy arguments made here by the Media Bureau. Without repeating our entire analysis as set forth in our *KTVO* decision, we rejected as without direct support and overly-strict the Bureau's rigorous assertion that a transmitter relocation applicant must invariably show that any move engendering a new service white area was occasioned by technical, financial, or other problems "beyond the control of the licensee." Without entirely disagreeing

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[1] *See* Elba Br. at 44–48. Subsequent to the filing of exceptions in this proceeding, the Board issued its decision affirming the ALJ's initial decision in the Kirksville, Missouri case, *see KTVO, Inc.*, FCC 83R-98, released December 13, 1983, 54 RR 2d 1456 (Rev. Bd.) (hereinafter *"KTVO"*).

[2] *See* Med. Bur. Br. at 2–4. Our discussion of the dispute concerning the admission and consideration of Elba's CATV service evidence commences at para. 9, *infra*.

[3] Med. Bur. Reply at 17.

[4] *Id.* (emphasis in original).

[5] *Id.*, at 18.

with the Media Bureau's basic contention in *KTVO* that a relocation applicant must show more than "mere service gains," we looked deeper in *KTVO* than to mere quantitative factors and analyzed as well the *qualitative* nature of the service that would be gained as a result of the relocation proposed therein, all as part of our overall public interest determination. We found in *KTVO* that the service gains to be realized by a grant there would advance important qualitative public interest goals previously exhorted by the Commission in matters involving a distribution (or redistribution) of broadcast service as part of the agency's larger implementation of Section 307(b) of the Communications Act, 47 U.S.C. §307(b). Thus, whereas the *KTVO* relocation would have engendered a net (Grade B) first service loss to only 1,116 persons, there also would have been 7,353 persons gaining a second (Grade B) service,[6] and over 150,000 persons gaining a third television service. Although the provision of a third television service has not, in and of itself, been specified as a top priority goal of the Commission in its overall frequency distribution schema, the character of that particular third service took on heightened importance in *KTVO* because it concomitantly fulfilled another important goal previously stated by the Commission relating to the provision of *network television service*. Specifically, in *WFMY Television Corp.*, 59 FCC 2d 1010 (1976), a landmark case which modified the Commission's historic "UHF Impact" policy, the Commission announced that it would thenceforth engage in a broader balancing of the public interest benefits portended by proposed changes in VHF service and approve such changes if the greater public interest benefits outweighed any potential detriment to UHF service. In enunciating those specific public interest benefits it would consider as an offset to adverse UHF impact, the Commission stated:

> By this we mean that, regardless of the characterization of the impact on UHF, the VHF applicant should be permitted to demonstrate by countervailing evidence, that, overall, the weight of the public interest favors a grant of the application. *This may be done by any of the criteria which we have traditionally considered in allocations-related matters.* This includes, but should not be limited to, first or second service to new areas; *first network service; choice of networks, etc.* 59 FCC 2d at 1017 (emphasis added). As we noted in *KTVO*, therefore, the provision of first ABC network service to more than 200,000 persons (and, presumably, *competitive* network service to nearly that many) was a specific public interest benefit worthy of positive recognition.[7] Hence, to the extent that the third service gains projected in *KTVO* collaterally embraced first ABC

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[6] The provision of a first and second service to television viewers is a long-standing Commission objective. *See Television Assignments*, 41 FCC 148, 167 (1952).

[7] *See KTVO* at para. 8 & n.13 (the footnote citing to *Central Alabama Broadcasters, Inc.*, 88 FCC 2d 1501, 1564 (Rev. Bd. 1982)) where we took into account the Commission's espoused public interest consideration of first and competitive network service in accordance with the teachings of *WFMY Television Corp.*, *supra*.

network service in that very large gain area, such gains weighed heavily in the applicant's favor as a discrete public interest factor. *See KTVO* at paras. 8, 12.

6. The facts in the case at bar do contain a number of similarities to the facts in *KTVO*. For instance, Elba would continue to fully cover its city of license (St. Joseph, Missouri) with the requisite Grade B signal; it would not be short-spaced with any existing frequency nor would it create any other technical interference problems with respect to extant broadcast service; its total service gains (in both area and population) substantially outweigh the numerical losses; and, its projected loss area represents only a small percentage of its entire proposed (Grade B) service area.[8] However, from both a quantitative and a qualitative perspective, the superficial similarities with *KTVO* are supplanted by material differences as we move into closer focus.

7. First, in designating this case for hearing, the Commission expressly examined the gains and losses expected by Elba at the time it submitted its application, and noted:

> . . . KQTV's proposed relocation would create an unserved area of 5,805 persons in an area of 429 square miles. Elba relies upon the elimination of an unserved area (KQTV would provide a first TV Service to 5,934 persons in an area of 418 square miles) and argues that translators and rooftop antennas can be used to minimize the loss of service to the public, as offsetting factors.

Designation Order at para. 10. Based on those facts, it concluded:

> On the basis of the facts presently available, the Commission is not persuaded that the creation of an unserved area is offset by other factors. *Surely the fact that the unserved area being created is nearly identical in size and population to that being eliminated does not constitute a substantial offsetting factor, particularly in light of the fact that there would be additional loss areas.* If the deprivation of all predicted television service in an area is to be justified in this case, it must be done in the context of an evidentiary hearing where all factors can be subjected to the close scrutiny they deserve.

Id., at para. 11 (emphasis added). However, by Elba's own admission, the census figures apparently consulted at the time of designation were outdated (*see id.*, para. 5). And, whereas the Commission

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[8] Based upon KQTV-TV's predicted Grade B contour, Elba's gains and losses were estimated as follows:

Number of	*Gain*		*Loss*	
Existing Services	*Area*	*Population*	*Area*	*Population*
0	477	5,976	791	9,936
1	572	7,279	5	71
2	201	1,406	32	109
3	2,035	29,157	10	111
4	208	5,283	–	–
5-or-more	4,368	426,412	–	–
Total	7,861	475,513	838	10,227

I.D., para. 6.

evinced serious concern that Elba's then-projected first (Grade B) service loss area contained "5,805 persons in an area of 429 square miles" while its corresponding gain area was "5,934 persons in an area of 418 square miles," the census data presented at hearing revealed that the *actual* first (Grade B) service loss area was nearly twice as large as the figures causing the Commission's original concern. That is, instead of creating a first (Grade B) service loss area of 5,805 persons and 429 square miles, the more recent figures showed a first (Grade B) service loss area of 9,936 persons and 791 square miles (*see* Table at note 8, *supra*) while the projected gain area remained about constant (*i.e.*, 5,976 persons and 477 square miles). Second, if we look at the Elba relocation figures up to and including those gaining and losing a third service (and, hence, potentially gaining or losing one of the three major national networks), Elba's proposal seems quite weak. Thus, while only about 15,000 viewers would gain where there are now two-or-fewer existing services, approximately 10,000 viewers would lose their only existing (Grade B) service; and several hundred others would lose their second or third predicted (Grade B) service. Consequently, the gains in those areas where there are now two-or-fewer services increase over concurrent losses by a ratio of only about 1.5:1; in *KTVO*, by contrast, the corresponding ratio was about 7:1, or over four times greater.[9] Indeed, and unlike *KTVO*, very heavy service gains would not register here until we reach viewers now receiving five-or-more existing services; to wit, of a projected total population gain of 475,513 persons within Elba's proposed Grade B contour, 426,412 —*or about 90% of that total increase* —now receive five-or-more existing television services. Viewed in that light, Elba's proposal appears to be on a figurative plane with the delivery of "coals to Newcastle" and it benefits predominantly those who are already comparatively "rich" in existing television services. *Cf. The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 774 (Rev. Bd. 1970) (proposed service to FM white and gray areas not "significant" where "numerous" (5-or-more) AM services now exist). On top of all that, it is noted that Elba's station, KQTV-TV, is an ABC affiliate and its first service loss represents a demise of the only ABC network service to those 10,000 viewers. *I.D.*, para. 7. Compare this with KTVO-TV's first ABC network television service to over 200,000 persons in the proposed *KTVO* gain area.

8. As the Commission repeated in its order setting Elba's instant application for evidentiary hearing, the public interest focus in-

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[9] *See KTVO, supra*, at n.2 (showing that KTVO-TV's net first (Grade B) service loss was only about 1,100 persons, while the net first-thru-third (Grade B) service gain was about 156,000 viewers. Further, over 200,000 would be gaining a first ABC network service in that case. *See id.*, at para. 4.

volved in relocation requests is not simply a matter of mere numbers: rather, it declared[10]:

> . . . the weighing process in which we engage to determine whether the projected loss of service will be counterbalanced by other factors involves more than a mere comparison of numbers.

We were fully conscious of that elementary doctrine when deciding *KTVO*, and although there granting that station's application because of the *quality* of new service inherent in the quantitative gains to underserved areas, we reiterated the gravamen of the above-quoted policy principle and stated that "we emphatically do not intend this decision to imply that any licensee who can demonstrate some measurable surfeit of service gains over corresponding losses will automatically be authorized to relocate."[11] Consequently, and as detailed in the previous paragraph, we find vital differences between the facts in this case and those in *KTVO*. As to Elba's reliance on *KOTV*, *supra*, we likewise find at least one critical difference: in that case the ALJ permitted the requested relocation so as to allow all Tulsa, Oklahoma television stations to locate at the same transmission site (*i.e.*, an "antenna farm"), and to thereby prevent a serious competitive imbalance amongst those Tulsa stations. The Commission has historically recognized the furtherance of such competitive balance in similar situations as an independent public interest factor in support of relocation requests. *See Van Curler Broadcasting Corp.*, 24 RR 1079 (1963); *Capital Cities Broadcasting Corp.*, 24 RR 1067 (1963). Elba's situation is simply not comparable in that respect to the situation found by the ALJ in *KOTV*. In that regard, we wholly agree with the reasoning of the Media Bureau.[12]

ALLEGED MITIGATION OF SERVICE LOSSES

9. As did the applicant in *KTVO*, Elba proffered showings purported to demonstrate that even those viewers in the anticipated (Grade B) loss area will have other video-type services available to them, either through translators, or cable television, or through more distant television stations whose signals allegedly extend beyond their predicted Grade B contours. In support of its mitigation claims, Elba submitted the studies of three witnesses: Dr. Stephen J. Miller, professor of marketing at Oklahoma State University; Susan

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[10] *Designation Order* at para. 10 (*citing KOTV, Inc.*, FCC 79–607, released October 17, 1979).

[11] *KTVO* at para. 12. Our doctrinal differences with the Media Bureau in *KTVO* centered on its flat refusal to acknowledge that overwhelmingly large service gains could be considered and with its failure in that case to weigh the *quality* of the new service inherent in KTVO-TV's raw gain numbers, all as part of a comprehensive public interest balancing.

[12] *See* Med. Bur. Reply at 18–19; *see also* Jt. Reply at 23 (outlining other relevant distinctions between Elba and *KOTV*).

D. Harrison, Vice President of the consulting firm of Frazier, Gross & Kadlec, Inc.; and Dr. Alan Pearce, President of the consulting firm Information Age Economics, Inc. *See I.D.*, paras. 12–25. In brief, Dr. Miller's study concluded that 43.8% of the viewers in the projected loss area were connected to cable television, and that 82.9% of the non-cable households receive at least one station in addition to Elba's KQTV-TV. *Id.*, para. 14. The Harrison study concluded that "3,615 persons out of a total of 10,227 persons in the predicted loss area" were likely to lose all commercial television service. *Id.*, at para. 18. Dr. Pearce's study concluded that the loss of the KQTV signal would be mitigated by cable television in those counties now served by cable. *Id.*, paras. 23–24.

10. Before reviewing the ALJ's analysis of Elba's proffered mitigation evidence, including the rebuttal evidence submitted by respondents, it is imperative to explicate an underlying disceptation on the basic rule of law governing the admissibility of evidence relating to claims of alternative video-type service available through translators or cable television allegedly serving the projected (Grade B) loss areas. As good a place as any to start is by noting that the alternative viewing studies conducted by Elba's witnesses did not generally differentiate amongst those viewers whose purported alternative service would be furnished via television translator stations, or cable television, or beyond-Grade B television signals. *See, e.g., I.D.* at paras. 39, 41–42. Thus, the proffered Elba studies were, *pro tanto*, in conflict with the ALJ's unconditional ruling that "hearing evidence concerning reception from translators was [to be] specifically excluded because the Commission's designation order so directed." *Id.*, at para. 41.[13] Conversely, the ALJ did permit the introduction of evidence submitted by Elba to show the ostensible existence of cable television service in the projected loss area, and she did consider whether its cable service evidence mitigated Elba's projected service losses. *See id.*

11. The Media Bureau urges strenuously that it was patent error for the ALJ to have admitted or considered Elba's evidence insofar as it reflected alleged cable television service in the loss areas.[14]

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[13] The Elba *Designation Order* contained the customary boiler-plate that "translators cannot compensate for the loss of primary service." *Id.*, at para. 10. We assume that this is the precise *Designation Order* language to which the ALJ made reference in excluding evidence of existing translator service in the projected loss areas. We discuss at length the ALJ's reading of that particular aspect of the *Designation Order* at para. 14, *infra*.

[14] *See* Med. Bur. Br. at 2–4. In short, the Bureau contends:

> . . . the Bureau believes that the rationale underlying the long established Commission policy against cable television as a substitute for regular off-the-air television is still valid. The soundness of this policy is demonstrated by the fact that cable television does not serve all communities, or is even necessarily

Respondents challenge that ruling with equal fervor.[15] In our very recent *KTVO* disposition, we affirmed the rulings of the there-presiding ALJ who held that evidence relating to KTVO-TV's proposed translator service or that relating to alleged cable television service in the projected loss areas was not admissible. *See KTVO*, para. 11.[16] In so doing, we were necessarily confronted with a recent designation order issued by the Chief of the Mass Media Bureau on October 31, 1983 in the case of *Westinghouse Broadcasting and Cable, Inc.* (hereinafter "*Westinghouse Broadcasting*")[17] in which relocation applicants were apparently invited to demonstrate that any potential service losses "might be mitigated by existing services such as translators, low power television stations or cable television service . . . ."[18] However, in *KTVO*, the Media Bureau hastily assured us that the *Westinghouse Broadcasting* order signified absolutely no change in the Bureau's position regarding the inadmissibility of proffers claiming cable or translator services in the loss areas, and it claimed that steadfast policy continued to mandate the rejection of such proffers.[19]

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required to serve all parts of a community, and that one must pay a subscriber fee to receive cable television service. Moreover, a cable television system could decide in the future to discontinue service to any unprofitable areas without Commission approval and a cable television system has no Commission imposed obligation to originate local programming.

Id., at 3–4.

[15] *See* Jt. Br. at 17–19.

[16] The ruling in *KTVO* was not novel. *See Central Alabama Broadcasters, Inc.*, 88 FCC 2d 1501, 1533 (Rev. Bd. 1982) where we affirmed the rejection of cable and translator evidence in a relocation application case, and held:

> To begin with, WCOV and WKAB's arguments regarding the inclusion of CATV services in calculating the size of the white and gray areas are without merit. Traditionally, CATV services have not been regarded as the equivalent of regular direct television broadcast services. *See Monroe County Board of Commissioners*, 72 FCC 2d 683, 45 RR 2d 1365 (1979). Indeed, in *Monroe, supra*, the Commission felt compelled under the Communications Act to permit the extension of broadcast services to residents of a community already receiving those signals from a CATV system. It said 'that those residents who are not cable subscribers, as well as those who are, should be given the option to choose between cable television and broadcast services.' 72 FCC 2d at 686, 45 RR 2d at 1368. It would be inconsistent to hold that CATV service was no full substitute for a broadcast service for one purpose and at the same time to hold that CATV penetration figures should be considered in evaluating the merits of a broadcast proposal seeking to serve white or gray areas.

The Commission denied review in *Central Alabama* without modifying that holding. *See* FCC 83–210, released May 2, 1983 (Comm'n), *appeal pending sub nom. Montgomery Independent Telecasters, Inc.* v. *FCC*, No. 83–1557 (filed D.C. Cir. 1983).

[17] MM Docket No. 83–1160 *et al.*, Mimeo No. 467, released October 31, 1983 (per Chief, Mass Media Bureau).

[18] *See KTVO* at para. 11 (*quoting Westinghouse Broadcasting* at para. 8).

[19] *See* Med. Bur. Opposition (in *KTVO*), filed November 30, 1983. Despite the Media Bureau's assertion in that pleading that the *Westinghouse Broadcasting* designa-

12. In the case before us, the Media Bureau eases its *KTVO* position somewhat, and suggests that *Westinghouse Broadcasting* does represent the seeds, at least, of a potential policy relaxation with respect to relocation requests[20]; but it still contends that no such policy change has occurred as yet, and it states that that the aforecited *Westinghouse Broadcasting* language is merely *"dicta"* until such time as formally considered by the full Commission.[21] We agree, and abide by our holding in *KTVO* that evidence relating to cable or proposed translator service in the projected loss area is at this time inadmissible to mitigate against (Grade B) service losses predicted upon relocation proposals.[22] Should the referenced *Westinghouse Broadcasting "dicta"* metamorphize into ratified agency

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tion order was "not inconsistent" with its stated position in *KTVO*, we nonetheless found that there was an "apparent contradiction," and we urged the Bureau to internally review its position(s) with an eye toward clarification. *See KTVO* at n.18 (and note 22, *infra*).

[20] *See, e.g.*, Transcript of Oral Argument, Dkt. No. 82-763, December 16, 1983, at Tr. 584–590. We noted this faint glimmering in *KTVO*, and there reproduced *Westinghouse Broadcasting* designation order language which declared:

> The Commission would generally prefer to defer to the judgments of licensees as to the selection of transmitter sites. It is the licensee, not the Commission, that has the best information on such factors as population moves, the availability and suitability of sites for broadcasting and the costs associated with moves. In fact, the Commission has recently taken action that will expand the licensee's latitude in this area. In *Suburban Community Policy*, 53 RR 2d 681 (1983) (reconsideration pending), among other things, it abolished the *de facto* reallocation policy, which was one factor that limited the choice of transmitter sites in some cases.

KTVO at para. 9.

[21] *See* Transcript of Oral Argument, *supra* note 20, at Tr. 591. The Media Bureau's position as to the impact of *Westinghouse Broadcasting* here coincides with that taken by the Board in *KTVO*. *See KTVO* at n.18 where we held that the *Westinghouse Broadcasting* designation order, standing alone, could not override "settled Commission case law." Our view there was forged, in the main, by deference to the legal axiom that enjoins agencies seeking to change past policy to accompany such change with "an opinion or analysis indicating that the [previous] standard is being changed and not ignored." *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). The designation order in *Westinghouse Broadcasting*, however, did not so much as mention the precedential standard regarding cable or translator evidence, and was thus considered legally insufficient to overrule it.

[22] We recognize, of course, that our holding in *KTVO* regarding the inadmissibility of cable and proposed translator evidence placed the ALJ (not to say the Media Bureau) charged with hearing *Westinghouse Broadcasting* in a delicate position. But, the Board cannot reverse or modify that designation order. *See generally Frank H. Yemm*, FCC 77-149, 39 RR 2d 1657, 1659 (1977). However, we respectfully suggest that the ALJ charged with hearing the *Westinghouse Broadcasting* case take immediate advantage of Section 0.341(c) of the Commission's rules, 47 CFR §0.341(c), and certify this matter forthwith for definitive resolution by the full Commission. Failure to resolve this matter promptly will allow the current confusion to continue and virtually assure the future adoption of inconsistent rulings on this important issue.

policy, then showings such as Elba's may be proffered and accepted for whatever probative value they may have in future cases.[23]

14. With that background in mind, we turn to the ALJ's rulings in the instant case. As indicated previously, the ALJ, relying on her reading of the *Designation Order*, ostensibly refused the introduction of evidence relating to television translator service in the loss area, but permitted and considered evidence of purported cable service. While appreciating that the ALJ felt constrained by her reading of the instant *Designation Order*, we believe that the ALJ's interpretation resulted in a logical asymmetry not necessarily intended by that document. To permit the adduction of evidence relating to cable television service in the projected loss area, while at the same time rejecting evidence of existing off-the-air translator service, would seem to us to avoid a key rationale of *Monroe County, supra* note 23, and imply that cable systems can be mitigating substitutes for lost primary television service while off-the-air translator signals cannot. And yet, in *Low Power Television Service*, 51 RR 2d 476 (1982), the Commission expressly found that low power or translator-type stations are a highly desirable means of providing off-the-air

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[23] For a succinct commentary in support of permitting evidence of cable service in predicted (Grade B) loss areas, *see KTVO*, Separate Statement of Board Member Jacobs (joined by Board Chairman Marino). Therein, the Board majority urged that consideration of such evidence would permit the Commission to take "into account the impact of modern technological conditions on off-the-air service losses, *e.g.*, that 34.5 percent of television households in the United States presently have cable service, and that 62.7 percent of such households have cable passing in front of them." *Id.*

On the other hand, the Bureau and other would argue that the language of *Monroe County Board of Comm'rs*, 72 FCC 2d 683 (1979), *aff'd sub nom. Tele-Media Corp.* v. *FCC*, 697 F.2d 402 (D.C. Cir. 1983) militates against equating cable service with off-the-air television. In *Monroe County*, the Commission did not accept the proposition that cable "should be considered to be more than a 'supplementary' service as the Commission has traditionally characterized cable systems," 72 FCC 2d at 684–685, and it held:

> It seems clear, therefore, that our obligations under the Communications Act of 1934, as amended, compel us to permit the provision of broadcast services to all of the residents of Monroe County, whether or not they are cable subscribers. We believe that those residents who are not cable subscribers, as well as those who are, should be given the option to choose between cable television and broadcast services.

Id., at 686.

Plainly, a momentous policy option is embedded in this issue, for if cable service can offset loss areas, an immense number of relocations may be abetted, depending, naturally, on the mitigative weight accorded. Because of the far-reaching ramifications attending this policy choice, it should be thoroughly considered and explicitly articulated at the highest agency level.

television service, "particularly in areas where there currently is little or none."[24] Consequently, and although Elba's proffered translator evidence would not have changed the ultimate result in this case, we are not as certain as the ALJ or the Media Bureau that *all* evidence relating to translator service in the projected loss area was to be barred. An alternative reading of both the precedent *and* the instant *Designation Order* is that Elba was barred only from seeking to mitigate its service losses through the translators Elba itself *proposed as a substitute* for the KQTV-TV primary service it would withdraw,[25] but that evidence of *pre-existing* translator service might be shown as an off-the-air alternative both available and utilized in its projected loss area. Such a reading would also be consistent with the *Designation Order* language which (1) rejected Elba's arguments that its *proposed* translators could cover some of the loss area and (2) reiterated that "translators cannot *compensate* for the loss of primary service," *see id.*, at para. 10. It is also consistent with the situation in *KTVO*; and it seems, in fact, that in every relocation case in which the aforecited language relating to translators was included, the relocation applicant there *proposed* to deploy its own translator(s) in projected loss areas. *See, e.g., West Michigan Telecasters, Inc.*, 22 FCC 2d 943, *recon. denied*, 26 FCC 2d 668 (1970), *aff'd sub nom. West Michigan Telecasters, Inc.* v. *FCC*, 460 F.2d 883 (D.C. Cir. 1972).[26] In view thereof, it may well be that although Elba was foreclosed—as were previous relocation applicants—from projecting its *proposed* translators to "compensate" for its primary service withdrawal, it was not necessarily foreclosed from showing that those viewers now receive acceptable (Grade B-equivalent) service from *pre-existing* translators. At the very least, though, it appears that the ALJ should not have categorically excluded potential evidence of currently available translator service while simultaneously considering evidence of alleged cable service. As we ventured above, this disparate treatment strikes us as a *non-sequitur*. Because—as we explain more fully below—Elba's showings of alleged alternatives (cable and/or translator) in the loss area were fatally flawed in other major respects, we need not resolve this issue for purposes of this case; had it in any event been considered, the proffered translator evidence would not have been terribly probative or useful.

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[24] *Id.*, at 522. Accordingly, the Commission established a three-tiered processing order for low-power stations, with the highest priority going to "lesser-served rural areas." *Id.*, at 580.

[25] As with *KTVO*, where the same boilerplate relating to translators was present in the designation order, Elba has already licensed to it two translator stations which it proposed to deploy in the two largest population centers in the loss area. *See* Elba Br. at 3. In *KTVO*, we agreed with the ALJ that KTVO-TV could not use its own *proposed* translators to offset service losses, *see id.*, at para. 11; we said nothing therein about *pre-existing* translator service.

[26] *See also Central Coast Television*, 18 FCC 2d 794, 795 (1969); *The Outlet Company*, 11 FCC 2d 528, 530 (1968).

15. Even were we to put aside precedent (and also ignore the objections of the Media Bureau and respondents), we would have to conclude that Elba's evidence of alleged alternative video services in the projected loss area was inadequate to warrant Elba much by way of mitigation. In the final analysis, its proffered evidence proved very little. Thus, for example, the study prepared by Dr. Miller apparently surveyed eleven communities. Unfortunately, six of those eleven communities were not even within Elba's projected loss area. *See I.D.*, para. 39. The studies done by Ms. Harrison and Dr. Pearce were likewise given little weight for the primary reason that they relied upon general county-wide data and did not attempt to survey the *actual* Elba loss areas here involved. In fact, Ms. Harrison herself was under the fundamental misimpression that the county-wide Arbitron data she used as her principal survey source could be advanced to show—by simple extrapolation—that viewing registered in one county translated into relatively proportionate viewing in any part of that county, including Elba's various loss areas.[27] However, Ms. Harrison's statistical leap of faith was sharply rebutted by Arbitron itself.[28]

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[27] Ms. Harrison testified:

A. A hypothesis that we [Harrison] had when we first began using the county coverage data, was that since Arbitron was warranting that this was in fact county-wide information, that it could be applied to any portion of the county. So that was not an analysis, it was a hypothesis. It was a consideration that we made.

Q. Has Arbitron stated that in writing anywhere that you know of?

A. Not specifically, no. I don't think they have got a policy statement. But if they provide a document which is called County Coverage and which purports to represent the county-wide viewing patterns, that is my interpretation of it.

Q. So again, it is your interpretation that Arbitron is saying that you can use county-wide data to draw conclusions as to viewing in a small discrete segment of the county?

A. Yes.

[Tr. 178–179]

[28] Respondents produced the testimony of Mr. Anthony Kelsey, General Counsel and Assistant Secretary of the Arbitron Company, who deposed:

> I can state categorically that there is absolutely no Arbitron 'warranty' of any kind that data compiled for a full county can reliably reflect viewing patterns in any discrete portion of the county.
>
> It definitely is not Arbitron's intention that full county viewing information ever be used to predict or project viewing behavior in segments of counties. Ms. Harrison's statement is totally in error.

Respondents' Rebuttal Exh. 1, at 1. The ALJ rejected the above Arbitron testimony

16. Nevertheless, but with the ALJ, Media Bureau, and respondents in contraposition, Elba argues that its county-wide data is adequate to show mitigation of the projected service losses to be occasioned by its relocation. It asserts that reliance on such data is consistent with established Commission policy, and states[29]

> That this is, in fact, the Commission's policy in cases involving analysis of potential service loss is shown by the Commission's decision in *VHF Top 100 Markets (Report and Order in Docket No. 20418)*, 81 FCC 2d 233, 261 (1980), where the Commission examined county-wide net weekly circulation figures in estimating a potential service loss.

Here we agree with the ALJ and the other parties that Elba's reliance on undifferentiated, county-wide figures leaves almost completely open the central question of the true magnitude of alternative service, if any, available in the *actual* areas where Elba's primary service would be lost. Although such county-wide data may have its conventional value, it cannot—as Arbitron affirms—provide any assurance whatever of coverage in subportions of specified counties, particularly in large, irregularly-configured counties. Moreover, while the Commission's reference to county-wide data in *VHF Top 100 Markets, supra*, as well as in other rulemakings cited by Elba, is perfectly appropriate in the context of the legislative-type judgments at issue in those broad-based proceedings, that is very different from Elba's circumstance here where it must establish its individual adjudicative case upon "reliable, probative, and substantial evidence." 5 U.S.C. §556(d).[30] That is the evidentiary standard in administrative adjudications such as this, *see id.*, but not in rulemakings designed with much wider policy issues in mind. *See generally FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). Accordingly, even if we took into account Elba's proffered evidence of alleged alternative service, we would agree with the ALJ and the other parties that Elba's evidence was not at all keyed to the *actual* loss areas and did not, therefore, reliably prove loss mitigation. While we hesitate to prescribe the various types of evidentiary showings which could be utilized in such cases, we believe that—at a bare minimum—such showings must reasonably relate to the specific loss areas involved; those loss areas are, obviously, the Commission's cardinal concern when contemplating station relocation requests.

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on the ground that Ms. Harrison's overall testimony was not thoroughly to the contrary. *See* Tr. 442–452. However, the Arbitron testimony was clearly relevant and we agree with respondents that its rejection was harmful error. *See* Jt. Br. at 6.

[29] Elba Br. at 32.

[30] Actually, of course, it is the agency's orders (hence, the Board's) which—under the referenced Administrative Procedure Act provision—must be supported by evidence meeting the cited legal standard. However, since the final evidentiary support for our decision can be no better here than Elba's, the effective standard is the same.

17. Finally, and in further rebuttal of Elba's proffered evidence regarding service gains and losses, respondents adduced their own surveys purporting to show that Elba's claimed gain areas should be correspondingly reduced by virtue of alternative services already available there as well. *See, e.g., I.D.*, para. 43. Ironically, however, respondents' surveys utilized the same (flawed) methodology as did Elba in attempting to show alternative service in the gain areas. *See id.* Nevertheless, the ALJ concluded that respondents had shown "some" alternative service in Elba's projected gain areas, although that conclusion is not—nor could it be—very specific. *See id.* As with the Elba surveys, respondents' county-wide generalizations are of equally little probative value. For all practical purposes, then, the government census figures employed to predict gain and loss populations remain our most reliable data reference and, as in *KTVO*, we must lean most heavily upon that official data for our instant determination, even if we assume "some" alternative penetration in the respective gain and loss areas.

INCIDENTAL PUBLIC INTEREST BENEFITS

18. Elba augments its public interest claims by asserting that, if its relocation is granted, it will provide tower space for certain Private Radio Service licensees at a nominal value. *I.D.*, paras. 26–29.[31] It submits that use of its new facilities will improve the coverage of those licensees. The Media Bureau hotly challenges Elba's offer of tower space as a public interest factor, and declares[32]:

> Indeed, it would appear that at any possible site for a tower relocation, there would be public service organizations anxious for free tower space. Therefore, if Elba's contentions on this matter were accepted, licensees would be free to relocate their towers toward more lucrative metropolitan television markets by merely offering free tower space to any takers of a public service nature. Such a contention is absurd.

Without going as far as the Media Bureau, we concur with the ALJ that no Commission case has relied on tower space offers such as Elba's as justifying a relocation grant. *See I.D.*, paras. 45–46. And, there is much validity in the Bureau's contention that offers of inexpensive tower space to prospective users should not carry dispositive public interest force, lest every relocation applicant seize on that device as leveraging a grant. Although there may be some public interest value here, no showing has been made that the facilities currently being used by these other licensees are seriously inadequate for their present purposes, or that other improvement options are not available to them. As to Elba's offer to donate higher outdoor antennas to certain residents in the loss area, we again agree with the ALJ that little public interest capital is involved. *See I.D.*, paras. 30, 44.[33]

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[31] The beneficiaries include the Atchison County Kansas Board of Commissioners, whose communications facilities include those used for public safety purposes. *See I.D.*, para. 27. The Army Corps of Engineers (Kansas City District) would also locate some of its antennae on the proposed Elba tower. *Id.*, para. 28.

[32] Med. Bur. Reply at 15.

CONCLUSION

19. In light of the foregoing, we cannot find that Elba's application to relocate in the manner requested is attended by a showing of public interest benefits of either the quality or magnitude sufficient to trigger a favorable disposition. Indeed, we are drawn to observe that if any relocation request could be characterized as illustrative of one in which not much more than "mere numbers" are offered in support, and where even those numbers are qualitatively devoid of cognizable public interest benefits, the Elba application comfortably fits that description. A television service relocation such as Elba's which would provide a first, a second, or a third (Grade B) service to only 15,000 new viewers (approx.) while depriving 10,000 (approx.) present viewers of in-kind service in return seems clearly not worth the candle, at least in terms of the public interest standards heretofore controlling. The primary beneficiaries of Elba's relocation proposal—apart from Elba, of course—would be those 400,000-plus viewers (or about 90% of Elba's total service gain) now receiving (Grade B) television service from five-or-more existing broadcast stations and, hence, not currently suffering from any dearth of reasonable service choice. Nor do we consider the incidental benefits claimed by Elba as adequate to offset the loss of primary television service (and ABC network service) in the projected white and gray areas. At the same time, we also recognize that the Media Bureau could be in a period of institutionally reappraising its most fundamental precepts in this exceedingly important policy area, and that material modifications of a deregulatory nature might emerge. Thus, should the rhetorical insinuations of the Media Bureau's aforecited *Westinghouse Broadcasting* designation order mature, in whole or in part, into crystalized agency policy, it might very well be that Elba's instant application should be reevaluated under the tenets of any such policy revision. Until that time, however, the ALJ's denial of Elba's requested transmitter relocation appears squarely consistent with established policy and precedent, and the ultimate conclusion of the *I.D.* under review is therefore affirmed.

20. ACCORDINGLY, IT IS ORDERED, That the application of Elba Development Corporation (KQTV-TV) (File No. BPCT-

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[33] Elba estimates the potential number of free antennas at 40; respondents estimate that number to be 24. *I.D.*, n.8.

801114KG) for authority to modify its existing facilities at St. Joseph, Missouri IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
ELBA DEVELOPMENT CORPORATION (KQTV (TV)) St. Joseph, Missouri	BC Docket No. 82-763 File No. BPCT-801114KG
For a Construction Permit for a Major Change	

Appearances

John P. Feore, Tim O'Rourke and *Christopher Smallwood* on behalf of Elba Development Corporation; *J. Richard Carr* on behalf of Scripps-Howard Broadcasting Co. and The Hearst Corporation; *John P. Crigler, Melodie A. Virtue* and *John Wells King* on behalf of Meredith Corporation; *Gerald Scher* on behalf of Mid-America Broadcasting of Topeka, Inc.; *Herbert D. Miller, Jr.* on behalf of Taft Broadcasting Co.; *William J. Potts, John P. Crigler* and *Melodie A. Virtue* on behalf of Topeka Television, Inc.; and *Stephen Yelverton* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE LENORE G. EHRIG

(Issued: August 17, 1983; Released: August 24, 1983)

Preliminary Statement

1. This proceeding involves the application of Elba Development Corporation, licensee of television broadcast station KQTV, operating on Channel 2 at St. Joseph, Missouri, for authority to move its transmitter from its present site approximately 2.8 miles east of the St. Joseph reference point to a point 5.3 miles east of Potter, Kansas, approximately 26 miles southwest of the St. Joseph reference point; to increase antenna height above average terrain from 810 feet to 1980 feet; and to operate with an effective radiated power of 100 kilowatts employing a directional antenna.

2. St. Joseph, Missouri, the city of license, is located 50 miles north of Kansas City, Missouri. At the present time, KQTV provides no primary city grade service to Kansas City, Missouri, Kansas City, Kansas, or Topeka, Kansas, nor is Grade A service provided to Kansas City or to Topeka, Kansas. Petitions to deny the KQTV application were filed by Scripps-Howard Broadcasting Co., licensee

of KSHB-TV, Channel 41, Kansas City, Missouri; The Hearst Corporation, licensee of KMBC-TV, Channel 9, Kansas City, Missouri; Meredith Corporation, licensee of KCMO-TV, Channel 5, Kansas City, Missouri; Topeka Television, Inc., licensee of KSNT, Channel 27, Topeka, Kansas; Taft Broadcasting Co., licensee of WDAF-TV, Channel 4, Kansas City, Missouri; and Mid-America Broadcasting of Topeka, Inc., permittee of KDLH-TV, Channel 49, Topeka, Kansas. Petitioners requested that Elba's application be designated for hearing on a number of issues including *de facto* reallocation, UHF impact, potential adverse effects on the environment, alleged lack of candor and the creation of an unserved area.

3. By *Memorandum Opinion and Order*, 47 Fed. Reg. 53478, released November 18, 1982, the Commission designated the KQTV application for hearing, but only on the single question of service gains and losses, as follows:

> (1) To determine what areas and populations would gain or lose service if the application were granted, and what other television services of at least Grade B level are available to those areas and populations;
>
> (2) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, a grant of the application would provide a fair, efficient and equitable distribution of radio service; and
>
> (3) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the application should be granted.

Petitioners were all made parties respondent and participated in this proceeding.[1] The Presiding Judge denied motions for enlargement filed by Taft, Scripps-Howard and The Hearst Corporation but clarified issue 1 by ruling that it was broad enough to permit consideration of evidence concerning all public interest factors relating to the proposed move.

4. A prehearing conference was held on January 20, 1983. Hearing sessions were held in Washington, D.C. on March 28, 29 and 30 and on April 26, 1983, at which time the record was closed. Proposed Findings of Fact and Conclusions of Law were filed by all parties as were Reply Findings.[2]

Findings of Fact

5. *Areas and Populations Gaining or Losing Television Service.* The proposed change in KQTV's facilities will result in both a gain

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[1] Applications filed by respondents seeking review of the *Designation Order* and reversal of the Mass Media Bureau's refusal to designate the additional requested issues were denied by the Commission by *Order* (FCC 83-316), released July 7, 1983.

[2] Requests for acceptance of late-filed pleadings were filed by Mid-America and the Mass Media Bureau. These requests ARE GRANTED and the tendered Proposed Findings of Fact and Conclusions of Law ARE ACCEPTED.

and a loss area within the station's predicted Grade B contour as follows (Elba Ex. 1, pp. 6–7):

	Grade B Contour			
	Area (sq. mi)		*Population*	
	Present	*Proposed*	*Present*	*Proposed*
Total	11,774	18,797	1,505,734	1,971,038
Gain		7,861		475,513
Loss		838		10,227
Net Gain		7,023		465,286

The proposed loss area is located in the northeastern part of the present coverage area comprising parts of ten counties in Iowa and Missouri, while the gain area is located in all other directions (Elba Ex. 1, p. 5, and Ex. 3, p. 4).

6. *Availability of Other Services*. The following is a tabulation of the predicted number of Grade B services available to the areas and populations gaining and losing Grade B service from the proposed KQTV relocation (Elba Ex. 1, p. 6):

Number of Existing Services	*Gain Area*	*Gain Population*	*Loss Area*	*Loss Population*
0	477	5,976	791	9,936
1	572	7,279	5	71
2	201	1,406	32	109
3	2,035	29,157	10	111
4	208	5,283	–	–
5 or more	4,368	426,412	–	–
Total	7,861	475,513	838	10,277

7. *ABC Network Gain and Loss*. KQTV is affiliated with the ABC television network. Below is a tabulation of the predicted gain and loss of first Grade B ABC network service which will result from the proposed Elba relocation (Elba Ex. 1, p. 7):

	Loss		*Gain*		*Net Gain*	
Number of Existing Services	*Area (sq. mi.)*	*Pop.*	*Area (sq.mi)*	*Pop.*	*Area (sq.mi.)*	*Pop.*
0	791	9,936	477	5,976	−314	−3,960
1	5	71	572	7,296	567	7,226
2	32	109	201	1,406	169	1,297
3	—	—	98	1,863	98	1,863
4	—	—	33	689	33	689
5 or more	—	—	—	—	—	—
Total	828	10,116	1,381	18,547	553	8,431

8. *Viewing Alternatives in the KQTV Gain Area*. The area which will gain its only predicted Grade B television service (referred to by respondents as Area 1) if Elba relocates its tower is comprised of portions of Johnson, Nemaha, Pawnee and Richardson Counties in Nebraska, and Marshall and Nemaha Counties in Kansas. Other portions of the latter two Kansas counties (Area 2) will receive a

second predicted Grade B service from KQTV (Respondents' Ex. 1, p. 2). Respondents submitted evidence concerning the estimated viewing of television stations by households in these areas in an attempt to demonstrate that the people in the gain area already have actual television service and thus no real public interest benefits would be achieved by the proposed relocation. This evidence consists of a television viewing survey of the gain area submitted by Norman Hecht, the President and founder of Information and Analysis, Inc., a company which conducts audience, programming and economic research for the communications industry. Mr. Hecht was formerly Vice President and General Manager of Arbitron, Inc., as well as its General Manager for Sales and Marketing, Director of Market Development, and Director of Research and Planning (Respondents' Ex. 1, p. 1). The survey in question was conducted by analyzing all of the non-cable 1982 Arbitron television diaries submitted by households in the gain area. Arbitron is a national television audience rating service which places diaries in selected television households in each county in the nation four times a year. Twenty-two diary homes were found in Area 1. Of these, eleven came from non-cable households in Pawnee County, Nebraska and were in an area with no predicted Grade B service.

9. The survey results indicate that all of the eleven reported households presently view at least one station, 82% of them view at least two stations, and 73% view at least three stations (Respondents' Ex. 1, pp. 4–6). Because no non-cable household diaries were found for households in Richardson County, Nebraska, a telephone survey was conducted on March 7, 1983, in various portions of that gain area.[3] A total of 120 calls to non-cable television households were completed. This survey indicated that all of the households could receive at least one station, that 99% could receive two stations and that 96% could receive three stations (Respondents' Ex. 1, pp. 4–5, 9–10). In the gain area that already receives one predicted Grade B service (Area 2), an analysis of 28 non-cable Arbitron diaries from Marshall and Nemaha Counties, Kansas, indicated that 75% currently view at least two stations (Respondents' Ex. 1, pp. 12–13). Thus, based on the Arbitron survey results and on the telephone surveys, Mr. Hecht concludes that virtually all residents of the gain area "can receive clearly, and actually do view, television" (Respondents' Ex. 1, pp. 16–17). The survey results and the telephone surveys also revealed that 82% of the non-cable households in Area 2 were able to receive NBC and CBS network affiliated stations and 36% were able to receive at least one ABC affiliated station. In Area 1, 82% of the non-cable households were able to receive three full network affiliated stations (Respondents' Ex. 1, pp. 16–17).

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[3] On cross-examination of Mr. Hecht, it was determined that certain of these households were outside but close to the gain area (Tr. 386).

10. *Viewing Alternatives in the KQTV Loss Area.* Grant of the KQTV application will result in the loss of KQTV's Grade B service to 10,227 persons residing in portions of ten counties in Iowa and Missouri which form a crescent shaped area to the northeast of St. Joseph. These ten counties are listed below, as are their populations and the populations of the county segments included in the loss area (Elba Ex. 4, p. 7; Elba Ex. 1, p. 15):

State	*County*	*County Population*	*Segment Population*	*Percent of County Population Involved*
Iowa	Page	19,063	1,050	5.51
	Ringgold	6,112	62	1.01
	Taylor	8,353	802	9.60
Missouri	Daviess	8,905	266	2.99
	Gentry	7,887	8	0.10
	Grundy	11,959	613	5.13
	Harrison	9,890	4,347	54.06
	Livingston	15,739	135	0.86
	Nodaway	21,996	20	0.09
	Worth	3,008	1,924	63.96
	Totals	112,912	10,227	9.06

The western portion of the crescent has other Grade B services. The balance of the loss area has no Grade B service other than that provided by KQTV.

11. Just as respondents submitted evidence to show that persons in the proposed gain area actually already receive service from other television stations, so did the applicant present data concerning the expected loss area. KQTV submitted evidence to demonstrate that loss of the KQTV predicted Grade B television service in the identified loss area would be offset by actual viewing of other stations beyond their Grade B contours and likely viewing of KQTV beyond its Grade B contour after it changed its facilities as proposed. Separate studies of three experts using different methodologies were offered to support the conclusion that the predicted loss area is more theoretical than real.

12. *The Miller Study.* Dr. Stephen J. Miller is a full Professor and the head of the Marketing Department in the College of Business Administration at Oklahoma State University, Stillwater, Oklahoma. Among other subjects, he teaches marketing research. He has supervised and conducted many general public surveys (Elba Ex. 2, p. 1). Dr. Miller conducted a telephone survey within the loss area to determine (a) the percentage of households which presently experience fair or better reception of KQTV, and (b) the percentage of households which experience fair or better reception of other television broadcast stations (Elba Ex. 2, p. 2).

13. The survey in question was conducted from February 21 to 26, 1983, and included 363 households out of a total of 3,918 in the loss area. The survey encompassed the communities of *Braddyville,*

College Springs, Shambaugh and Blockton in Iowa and Grant City/Allendale, Washington Center, *Ridgeway*, Bethany, Gilman City, *Brimson* and *Jamesport* in Missouri. It also included rural areas around these communities (Elba Ex. 2, pp. 1-4). It is noted as a threshold matter that Professor Miller indicated 13 VHF and 15 UHF stations are received in the survey area by one or more households (Elba Ex. 2, p. 5). The record shows, however, that of these 28 signals, two are available only to cable subscribers (Elba Ex. 2, pp. 5-8) and fourteen were unidentified. As to the latter, Professor Miller could not attest to the fact that they were not translators (Tr. 316). It is noted, too, that the six underscored communities are located near but nonetheless entirely outside the loss area. Additionally, Shambaugh and College Springs are within the Grade B contours of two Omaha, Nebraska commercial television stations (*Cf.* Elba Ex. 1, p. 12 with Elba Ex. 1, p. 13; see also Tr. 311-313).

14. The Miller survey results showed that 43.8% of the respondents were connected to cable television and that 55.6% relied on over-the-air reception. Most of those households without cable television had external antennas of 30 feet or higher (Elba Ex. 2, pp. 5-6). Moreover, 48.2% of the non-cable households receive station KQTV and 82.9% of the non-cable households receive at least two stations. Also, 70.6% of the non-cable households reported receiving from 3 to 7 stations (Elba Ex. 2, Tables 4 and 5, pp. 8-9). The survey also showed that only 1.9% of all the television households, both cable and non-cable, presently receive no adequate television reception. Dr. Miller concluded that the withdrawal of KQTV's service would result in an increase of 9.1% of all television households, both cable and non-cable, not receiving adequate television service. According to Dr. Miller, this translates into 282 households. Dr. Miller further concluded that 16.2% of the non-cable households would be without any adequate television service. Finally, he concluded that the current level of receipt of stations from outside the area indicates that signal reception for KQTV would likely still be available for many of the households in the survey area (Elba Ex. 2, Table 6, pp. 10-11).

15. In rebuttal to Dr. Miller's testimony, the respondents presented the testimony of Jules Cohen, an engineering consultant. Mr. Cohen noted that Tables 3 and 4 of the Miller exhibit show the stations that the survey respondents indicated they could receive. However, he stated that many of these stations are too far away to provide reliable signal reception, while others which are listed are actually local translator stations. Specifically, Mr. Cohen stated that five translator stations are operated near Shambaugh, Iowa, one of the communities in the Miller survey, and that although these translators rebroadcast the signals of stations too far away to provide a reliable signal, they were listed in the Miller survey as being received in the survey area. Therefore, Mr. Cohen concluded

that reports of receiving such distant signals actually relate to the reception of signals by means of local translator stations (Respondents' Rebuttal Ex. 2; Tr. 434-5, 437).

16. According to Norman Hecht, the former Vice President and General Manager of Arbitron Television (Respondents' Ex. 1, p. 1), in order to produce a valid survey of television viewing, it is necessary to ask respondents to identify both the channel numbers and the call letters of the station viewed. Unless this is done, there is no way to determine whether viewing reported of a given station is actually the specified station or a nearby translator station (Respondents' Rebuttal Ex. 3, p. 7). Along this line, Mr. Hecht testified that, in view of the relative signal strengths of the translators and the translated stations in Shambaugh, Iowa, "it is highly probable that the viewing reported to the primary stations was actually to the translator stations, and not to the primary stations" (Respondents' Rebuttal Ex. 3, p. 7).

17. *The Harrison Study.* Susan D. Harrison is Vice President of Frazier, Gross & Kadlec, Inc., a Washington, D.C. firm which advises broadcasters and cable television operators on matters relating to the management and operation of broadcast and cable television facilities. The firm prepares market studies, revenue projections, expense estimates, operating cost analyses and management studies for its clients (Elba Ex. 3, p. 1). The purpose of the Harrison study was to determine (a) the prevalent viewing habits of the population within the area which would lose the predicted KQTV Grade B coverage; (b) the number of viewers in the study area that receive their television service via cable television systems and the number that receive their service off-the-air; and (c) how households in the study area may be expected to alter their viewing patterns in the absence of KQTV's predicted Grade B coverage (Elba Ex. 3, p. 3).

18. The Harrison study concluded that 3,615 persons out of a total of 10,227 persons in the predicted loss area would be likely not to receive any commercial television service in the event that Elba's tower was relocated (Elba Ex. 3, p. 23). This estimate was determined by using Arbitron county-wide television viewing data for the affected counties. The Harrison study was conducted on the assumption that county-wide television viewing patterns in each of the affected counties were representative of the viewing patterns within discrete portions of the counties which would lose predicted Grade B service from station KQTV. Arbitron county coverage reports for the years 1978 to 1982 were used in the study. A number of the county reports included cable television viewing in their results (Elba Ex. 3, pp. 1-5). The methodology employed by Ms. Harrison for determining the number of television households likely to be without television

service was to take the highest five year average "net weekly circulation"[4] in an affected county of a station other than KQTV and subtract that figure from 100 percent. Thus, if another station, such as one from Kansas City, had a "net weekly circulation" in an hypothetical county of 90%, then 90 was subtracted from 100 to obtain the result of 10. Therefore, it was concluded that 10% of the television households in the actual loss area would be without any television service. This result was based on the assumption that 90% of all television households in the hypothetical county will still continue to receive the other station and that television viewing throughout the county is uniform (Elba Ex. 3, pp. 9-12). The results for Worth and Harrison Counties, Missouri, the only counties where a significant portion of their land area is within the predicted loss area, are as follows (Elba Ex. 3, pp. 16 and 19):[5]

Harrison County, Missouri

Total population	9,890
Population of Loss Area	5,347
Non-KQTV Net Weekly Circulation (5 year average)	57%
Estimated Loss	43%
Total Persons Affected	2,254

Worth County, Missouri

Total population	3,008
Population of Loss Area	1,924
Non-KQTV Net Weekly Circulation (5 year average)	46%
Estimated Loss	54%
Total Persons Affected	1,038

19. The Harrison study also estimated the maximum loss of ABC network service using the same methodology. The results indicate that out of the total loss area population of 10,227, 6,212 persons would be without ABC network service. The results in Harrison County are 4,087 persons out of 5,347 in the loss area and in Worth County, 1,520 persons out of 1,924 in the loss area (Elba Ex. 3, p. 25). Finally, Ms. Harrison examined 27 actual diaries from television households in the predicted loss area. These included 14 diaries from Harrison County and 12 from Worth County. According to Ms. Harrison, 8% of the Harrison County television households in the

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[4] Arbitron defines "net weekly circulation" as the estimated number of different television households within a county that view a given station at least once a week for five minutes or more (Elba Ex. 3, p. 9).

[5] Because only a small fraction of the other counties is within the predicted loss area, the Presiding Judge agrees with the Bureau's position that no meaningful analysis can be made from county-wide data for those counties. Also, these counties have no population centers in the loss area, whereas Worth and Harrison Counties do.

predicted loss area and 40% of the Worth County television households in that area can now only receive KQTV. Thirty-four percent were connected to cable television (Elba Ex. 3, pp. 8, 31, App. C-L).

20. In rebuttal to the Harrison study, the respondents submitted the testimony of Norman Hecht (Respondents' Rebuttal Ex. 3). Mr. Hecht challenged the use of county-wide Arbitron data to estimate television viewing patterns in the predicted loss area, stating his opinion that the use of such county-wide data to estimate viewing patterns in discrete areas of the county is inherently unreliable. Specifically, he stated that "net weekly circulation" is usually highest in discrete locations where reception is best and lowest where reception is poorest. Also, Mr. Hecht quoted from the hearing testimony of Dr. Alan Pearce, an expert witness for Elba (see *infra*), who stated that "net weekly circulation" may not show the true level of reliance of viewers within a county on a particular station's service (Respondents' Rebuttal Ex. 3, pp. 2–4; Elba Ex. 4, p. 16).

21. *The Pearce Study*. Alan Pearce, Ph.D. is a telecommunications economist, regulatory and legislative policy consultant, with extensive experience before the Federal Communications Commission, the House of Representatives Committee on Interstate and Foreign Commerce and the Office of Telecommunications Policy. For several years, he has been an independent consultant and researcher. He is President of Information Age Economics, Inc., a Washington, D.C. based research group specializing in policy research in the telecommunications-information industry. Dr. Pearce teaches at the University of Maryland, the George Washington University, and New York University Law School. He has published widely (Elba Ex. 4, pp. 25–26).

22. The purpose of the Pearce study was to measure the impact, if any, of the proposed facilities change on television viewers in the loss area. The study looked at current viewing patterns and relied upon material collected by the U.S. Bureau of the Census, Arbitron Reports, and market data from *The Survey of Buying Power* (Elba Ex. 4, p. 21; Tr. 68). It must be noted, however, at the outset that as was the case with Ms. Harrison, Dr. Pearce assumed that county-wide data could properly be used to draw conclusions concerning viewing in small segments of counties. Since his stated role was to take a "macro view," Dr. Pearce made no effort to test the validity of this assumption (Tr. 66).

23. Dr. Pearce computed that there are 4,042 households[6] in the loss area within ten affected counties (Elba Ex. 4, p. 8). Of the ten counties, only Harrison, Nodaway and Worth are in the St. Joseph

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[6] According to Dr. Pearce, in the television broadcasting industry, audience levels are most frequently referred to in terms of households rather than individual persons. Within the ten affected counties, the average number of persons per household varies from a low of 2.4 to a high of 2.8 (Elba Ex. 4, p. 9).

Area of Dominant Influence. The A.D.I. is the definition of a television market used by Arbitron. It includes all counties in which the majority of viewers receive and choose to view transmissions from the home market commercial station or stations (Elba Ex. 4, p. 2). Three thousand, eleven (3,011) households are in that part of the predicted loss area which is within the three counties in the St. Joseph A.D.I. (Elba Ex. 4, p. 21).

24. Dr. Pearce quantified one alternative to KQTV in the loss area, *i.e.*, cable television. There are cable systems serving Bethany City in Harrison County and Grant City in Worth County, with at least 1,500 subscribers, approximately 37% of the total households affected by the proposed move. Because the cable television systems would continue to provide adequate television service to the loss area, Dr. Pearce concluded that the impact would be greatly lessened (Elba Ex. 4, pp. 10–11). He also noted that only a few of the affected counties are in the St. Joseph A.D.I., that the viewership of KQTV is low in many of the affected counties, and that other stations have a significant percentage of the television audience in the affected counties (Elba Ex. 4, Table 6, pp. 17, 21–22).

25. In rebuttal, the respondents submitted the statement of Norman Hecht that the use of county-wide data by Ms. Harrison and by Dr. Pearce, with no correlation to the actual loss area, is unreliable (Respondents' Rebuttal Ex. 3, p. 4).

Public Interest Factors

26. In addition to its position that the loss area created by its proposal will, in fact, continue to receive television service, Elba submitted evidence of other offsetting factors supporting a grant of its application. For example, the record reveals that Elba had entered into an agreement in principle with Public Television 19, Inc., the licensee of non-commercial educational television station KCPT in Kansas City, Kansas, under the terms of which Public was to be allowed to use KQTV's proposed new tall tower as the antenna site for a satellite station to operate on Channel 22 at St. Joseph, Missouri (Elba Ex. 9). However, the proposed site would be short spaced by eleven miles to the Channel 22 allocation in Joplin, Missouri (Respondents' Rebuttal Ex. 2, pp. 5–6), and the agreement is no longer in effect.[7]

27. Elba will provide space to numerous public service and government organizations on its proposed tall tower for the nominal

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[7] By *Memorandum Opinion and Order*, FCC 83M-1561, released May 12, 1983, the Presiding Judge granted Elba's request that official notice be taken of an application filed by the licensee of Channel 19, proposing to locate its Channel 22 antenna on KQTV's *existing* tower, rather than on the *proposed* KQTV tower. This official notice was taken for the limited purpose of showing that Public Television's proposal to locate its antenna on the proposed new KQTV tower will not come about.

rental of $1.00 per year (Elba Ex. 5, p. 3). Among these are the Atchison County Kansas Board of County Commissioners. The communications facilities presently used by the Board for ambulance, rescue, civil defense, police and fire service purposes are such that several dead spots occur in the western part of the County. Elba proposes to allow the Board to place radio equipment on its proposed tower. This will provide better communications to all parts of Atchison County (Elba Ex. 5, pp. 1–2).

28. The Army Corps of Engineers, Kansas City District, has jurisdiction over water traffic on the Missouri River and other locations for civil and military purposes. It has stated that in order to improve the dependability of its communications network, it will enter into an agreement with Elba looking toward the use of the proposed KQTV tower for some of its communications facilities (Elba Ex. 5, p. 2).

29. The Northwest Missouri Repeater's Association has also expressed willingness to enter into an agreement with Elba for the lease of space on the proposed KQTV tower to increase its service area and facilitate communications with Kansas City. Operation from the new site would allow the Association to operate more effectively in weather disasters and other emergencies (Elba Ex. 5, p. 3).

30. In order to ameliorate the loss of KQTV's Grade B service in the loss area which will come about as a result of the proposed transmitter move, Elba proposes to make free antennas available to certain of the residents there. The free antennas will not be available to cable subscribers, to persons living within the Grade B contours of Elba's proposed Bethany or Grant City translator stations, or to persons already owning outdoor antennas (Elba Ex. 5, pp. 5–6).[8] It is noted, however, that according to Professor Miller, 99.4% of the households in the loss area have either an external antenna or cable (Elba Ex. 2, p. 5). Additionally, 7,093 residents in the loss area live within the proposed Grant City and Bethany translator Grade B contours (Tr. 34).

31. Mr. Mel Clark, KQTV's Chief Engineer, testified that many viewers in St. Joseph have outdoor antennas oriented toward the television stations in Kansas City, which results in a problem called ghosting. He also testified that viewers within two or three miles of the present transmitter receive such a strong signal from KQTV that their television sets are overloaded, resulting in deterioration of service, specifically, loss of color (Elba Ex. 6). According to Mr. Clark, the proposed site near Potter, Kansas, would be more in the direction to which the majority of the outdoor antennas in St. Joseph are

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[8] In their Reply Findings (at page 23, n. 9), respondents calculate that when all of the excepted viewers are added up, the number of free antennas Elba intends to donate would only be 24. It its Reply Findings (at page 27, n. 24), Elba estimates the number of eligible households to be 40.

oriented and thus will result in an improvement of service on both scores (Elba Ex. 6). As to both the "ghosting" and "overloading" problems, Mr. Clark could not recall the number of complaints received nor could he elaborate in any way about the nature of any complaints received (Tr. 266–68). Finally, Mr. Clark stated that zoning restrictions would prevent the construction of a tall tower at the present site (Elba Ex. 6, p. 1).

Conclusions

32. Issue 1 in this proceeding seeks to determine the areas and populations which will gain or lose television service by virtue of a grant of the Elba application and the number of other television services of at least Grade B level available to those areas and populations. Issue 2 seeks to determine whether a grant of Elba's application would provide a fair, efficient and equitable distribution of radio service in accordance with Section 307(b) of the Communications Act of 1934, as amended.

33. In regard to issue 1, the record establishes and it is concluded that Elba's proposed relocation will deprive 10,227 people in an area of 838 square miles of KQTV's Grade B television service. Of these, 9,936 persons in 791 square miles will lose their only Grade B service. Additionally, there will also be a net loss of their first network service to 3,960 persons residing in 314 square miles. The proposed move will, however, provide a first predicted Grade B television service to 5,976 people in an area of 477 square miles. In all, a grant of Elba's application will result in a net gain of service to 465,286 persons residing in 7,023 square miles. The record also shows that the proposed move will provide a second television service to 7,279 persons in 572 square miles, a third to 1,406 persons in 201 square miles, a fourth to 29,157 persons in 2,035 square miles, and a fifth television service to 5,283 persons in 208 square miles.[9]

34. "Once in operation, a station assumes an obligation to maintain service to its viewing audience . . ." *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964). Moreover, "[i]t is an undisputed principle that the loss of service and, particularly, the withdrawal of the only existing service to an area, is *prima facie* against the public interest, absent a substantial showing of offsetting factors. *Hall* v.

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[9] In their findings, respondents noted that whereas operating from its present transmitter site, KQTV provides a calculated field strength of 111 dBu to the St. Joseph reference point, from its proposed site, KQTV's calculated field strength to the reference point would be reduced to 81 dBu. They propose the conclusion that this loss in signal strength of approximately 30 dB is *prima facie* against the public interest. Elba properly points out that no claim has been made that the reduction in decibel level of service to St. Joseph would violate the Commission's requirements. Moreover, the Commission has refused to consider a mere reduction in decibel level to be significant. *Minneapolis Star & Tribune Company*, 88 FCC 2d 1604, 1611, n. 10 (Rev. Bd. 1982).

Federal Communications Commission, 237 F.2d 567 (D.C. Cir. 1956)." *KOTV, Inc.*, 44 Fed. Reg. 60818, released October 22, 1979, at para. 13.

35. In *KTVO, Inc.*, 63 FCC 2d 770 (Rev. Bd. 1977), *review denied*, FCC 78–164, released March 7, 1978, the creation of unserved areas formed one of the grounds for denial of a similar application for a major modification of facilities. There, the Review Board, citing the Commission's *Sixth Report and Order on Television Allocations*, 41 FCC 148 at 167 (1952), stated that: "The most important priority of the television allocation scheme is to 'provide at least one television service to all parts of the United States' . . ." The Board denied KTVO's application to change its transmitter site where the change would have created a "white" area of 3,418 persons living in an area of 509 square miles. The Board recognized that the change would have resulted in the provision of a first ABC television network service to a net of 223,000 people, most of whom already received at least two other network television services. Nevertheless, the Board concluded that the benefit of serving a larger population with an additional network service was not significant enough to outweigh the detriment that would result from a grant of KTVO's proposal in light of the importance of the Commission's objective regarding "white" areas. In so ruling, the Board cited *Central Coast Television*, 14 FCC 2d 985, 1001 (Rev. Bd. 1968), for the proposition that, "It is well settled that the mere fact that total gains exceed losses does not, standing alone, constitute an affirmative factor offsetting those losses."

36. In *West Michigan Telecasters, Inc.*, 22 FCC 2d 943, 945 (1970), *recon. den.*, 26 FCC 2d 668 (1970), *affirmed sub nom.*, *West Michigan Telecasters, Inc.* v. *Federal Communications Commission*, 460 F.2d 883, 23 R.R. 2d 2123 (1972), the Commission denied an applicant's request for a waiver of the Commission's mileage separation rules and its request for permission to operate with a directional antenna on the ground that the move would result in the loss to 49,718 people of their *third* Grade B signal which was "not offset by alleged gains in an area of multiple signals." There, the Commission, citing the *Hall* case, *supra*, referred to such a loss as "*prima facie*, inconsistent with the public interest."

37. Based upon the above, it is clear that, in the absence of offsetting public interest considerations, the creation of an area of 838 square miles containing 10,227 persons who will lose their only predicted Grade B television service and the loss to 9,936 persons residing in 791 square miles of their only ABC network service cannot be found to be in the public interest and would clearly dictate the denial of Elba's application. Citing its earlier designation order in the *KOTV* case, the Commission stated at paragraph 10 of its *Order* herein, "The loss of service and, clearly, the creation of an unserved area are serious matters, particularly to those viewers who

will suffer the loss." The decision in this case, therefore, must flow from the answer to the question: Do the offsetting public interest considerations which were placed in evidence by Elba justify approval of its proposed move with the consequent creation of an area wherein there reside approximately 10,000 viewers who will suffer the loss of their only Grade B and their only ABC television service?[10] The record herein requires the Presiding Judge to answer this question in the negative.

38. Much of the testimony in this case stems from Elba's efforts to show that the predicted loss of service which will result from its proposed move will in actuality be significantly less than predicted because television stations are viewed beyond the hypothetical curve which is their Grade B contour. Similarly, respondents have spent considerable effort endeavoring to establish that the area which purportedly will gain a first television service from Elba does already, in fact, receive television service. Elba has introduced evidence to rebut respondents' claim; respondents attack the validity of Elba's evidence.

39. In particular, respondents and the Bureau attack the Miller, Harrison and Pearce studies which were submitted by Elba to show that the loss area which Elba proposes to create is such in theory only. Respondents and the Bureau claim the Miller study is fatally flawed because the surveys which were conducted failed to distinguish whether the television viewers surveyed were receiving service from translators or from the primary station. The Jules Cohen rebuttal exhibit submitted by respondents, and which was uncontroverted by Elba, noted the existence of translators in the predicted loss areas. In its *Report and Order on CATV Systems and Auxiliary Television Services*, 18 R.R. 1573 (1959), the Commission stated that translators are not a substitute for regular direct television reception. Also, *see, Santa Fe Television, Inc.*, 18 FCC 2d 741 (1964). The Miller study sought to demonstrate that the television viewers in the loss area could clearly view other stations and thus the removal of the KQTV signal would not leave them without any television service. Because it cannot be determined how many of the survey respondents who claimed good reception on channels other than KQTV were actually viewing translators, and because translators are not a substitute service, no meaningful conclusions can be drawn from the Miller study. This is particularly true when considered along with the fact that six of the eleven communities where

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[10] Elba erroneously contends (para. 62 at p. 43 of its Proposed Findings and Conclusions) that the only issue in this proceeding is whether there is any public interest reason why it should not be allowed to relocate its transmitter. In so contending, Elba takes the position that the burden of proof was on the respondents to demonstrate why Elba's tower should not be relocated. Clearly, the reverse is true. Elba has the burden of demonstrating that the proposed relocation would be in the public interest. *See KOTV, Inc.*, 44 Fed. Reg. 60818, released October 22, 1979, at paras. 17 and 19.

Professor Miller contacted viewers are located outside the loss area.[11]

40. The Harrison study is flawed because it takes viewing data from the affected counties as a whole and seeks to apply that data to discrete portions of the county which fall within the loss area. Such a correlation is inherently unreliable because television signal levels are not necessarily uniform throughout an entire county. For example, if the Grade B contour of a Des Moines station covers most of Page County, Iowa, but only marginally covers part of the KQTV loss area, then county-wide viewing which is an average of all viewers, will be strongly weighted toward the Des Moines station and away from KQTV, even through viewers in the loss area would have differing viewing patterns. Even if her study were accepted, it is significant that Ms. Harrison concedes an estimated loss of all television service to 3,292 persons in Harrison and Worth Counties. Further, her analysis of a number, albeit small, of Arbitron diaries from the actual loss area indicated that 8% of the Harrison County households in the predicted loss area and 40% of the Worth County households in that area would lose all television service. In this connection, it is noted that in *KTVO, Inc., supra*, a loss of service to 3,418 persons was considered sufficiently significant to deny a proposed tower relocation.

41. Finally, the Harrison study relies to some extent on cable television viewing data to demonstrate the actual viewing of stations other than Elba's KQTV. Respondents and the Bureau point out that the *Report and Order on CATV Systems and Auxiliary Television Service*, cited above, rejects cable television, along with translators, as a substitute for regular direct television reception. They argue that because it cannot be determined how many of the viewers in the loss area rely on cable television or on regular television reception for viewing of stations other than KQTV, the Harrison study must be deemed unreliable. The Presiding Judge disagrees with this position. Whereas during the course of the hearing evidence concerning reception from translators was specifically excluded because the Commission's designation order so directed, data re cable penetration was held to be relevant in analyzing service to the loss area on the basis of the Commission's 1980 holding in *VHF TV Top 100 Markets*, 81 FCC 2d 233, 256. The Presiding Judge so ruled notwithstanding the Commission's 1959 holding lumping cable with translators. Clearly, the status of cable viewing has undergone

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[11] The Bureau argues that the Miller study is further flawed because the responses of the television viewers to the effect that their reception was "good," "fair," or "poor," were totally subjective in that what is "fair" to one person may be "poor" to another. Accordingly, the Bureau maintains that no objective comparison and analysis can be made of these survey results. The Presiding Judge does not find the latter argument persuasive in light of Dr. Miller's testimony (Tr. 328) that this type of adjective is commonly used in a wide range of survey studies with respect to attitude, image and the like.

monumental change in the almost fifteen years since the aforementioned *Report and Order*. But, giving full cognizance to Elba's contentions that between 34% and 43.8% of the residents of the areas surveyed by Ms. Harrison and Professor Miller are cable subscribers, we are left with the hard fact that between 56.2% and 66% are not. Hence, no significant weight can be given to the availability of signals via cable television in the loss areas Elba's proposal will create.

42. The Pearce study, too, relies totally on county-wide viewing data. Dr. Pearce admitted that he made no effort at all to focus on the actual loss area. This is significant since the loss area covers only discrete portions of various counties and, in many cases, only a small sliver of a particular county. Because television signals are not uniform throughout a county and because county-wide viewing data is an average of all viewers in a county, it is concluded that such county-wide data has little relevance to the actual viewing patterns in the specific loss area portions of a county.

43. As indicated, respondents argue that a grant of Elba's proposal will not, as it claims, result in the gain of any actual first or second service. They point out that although Elba proposes to provide a first and second service to portions of the gain area on a predicted Grade B service basis, the evidence in the record, based on Arbitron diary analyses and a telephone survey for the first service area (Area 1) and Arbitron diary analyses for the second service area (Area 2) (see paragraphs 8 and 9, *supra*), establishes extensive television reception and actual viewing in these areas. It is concluded that the methodology employed by Elba and by respondents in studying the gain as well as the loss areas is not dissimilar. Based upon the various studies and surveys, it is further concluded that there is television reception and actual viewing in the area which will gain a first and second service upon construction of the proposed facilities. Similarly, it is concluded that there is viewing of television signals beyond their Grade B contours in portions of the area which will lose their only Grade B and their only ABC television service. It is also concluded, however, assuming arguendo the accuracy of the Elba surveys, that there is still a conceded loss of their only television service to 3,615 persons (according to Ms. Harrison).

44. Recognizing this, Elba proposes to provide free outdoor antennas to persons in the loss area. But, its offer is a very narrow one. The free antennas are not available to anyone who already has an outdoor antenna, nor are they available to any cable television subscriber or to anyone living within the proposed Grade B contours of either of Elba's proposed translator stations. Even without regard to the latter restriction, which alone would make the offer unavailable to more than 7,000 (nearly 70%) of the residents of the loss area, it would be unavailable to the 99.4% who are either cable subscrib-

ers or owners of outdoor antennas. A free outdoor antenna would, therefore, be available to only a *de minimis* number of viewers.

45. Elba places heavy reliance on an Initial Decision in *KOTV, Inc.*, FCC 82D-54, released July 27, 1983, wherein a proposal to move sites of two Tulsa, Oklahoma, television stations was approved notwithstanding the creation of an area lacking in Grade B service. That case can be readily distinguished from this proceeding, however,[12] in that the offsetting benefits relied upon there were far more significant than those advanced by Elba. In *KOTV*, it was demonstrated that by virtue of a grant, air navigation safety would be enhanced; that all Tulsa television stations would be located in an antenna farm; that all Tulsa television stations would be located to the southeast of Tulsa, eliminating inter-market antenna orientation problems; that there would be substantial benefits to an educational television and educational FM station through the relocation, already approved by the Commission, of their antennas on the proposed new tower; and that a disparity in signal strength between the two moving Tulsa television stations and a third Tulsa station would be improved, providing the viewing public with equivalent off-the-air service from the three VHF network facilities in the Tulsa market.

46. Not one of these significant benefits would result from a grant of the Elba application. All that this record contains is evidence of arrangements with Atchison County, the Corps of Engineers and the Northwest Missouri Repeaters' Association which will result in upgrading of the communications facilities of these public service organizations by virtue of providing them tower space at a nominal rental. Elba also offered evidence in an effort to show that the proposed move would cure the ghosting as well as the overlapping problem which it claims has affected its viewers in St. Joseph for many years. The record seems to indicate, however, that the significance of these technical problems may be overstated. It is concluded that, either singly or collectively, the foregoing offsetting factos fail to constitute the substantial public interest benefits which are required to offset the loss of service, including the creation of a white area and a loss of the only ABC network service, which will result from Elba's proposed move.

47. The ultimate conclusion is therefore reached that a grant of Elba's proposal to move its transmitter and increase its antenna height will not foster the goals of Section 307(b) of the Communications Act of 1934, as amended.

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[12] In *KOTV* the same methodologies were used by the same three experts for reaching the conclusion that residents of a white area to be created would actually have some television service. The three studies in *KOTV* were, however, unrebutted, the antithesis of the situation here. The Bureau's position remains unchanged. It advocated in *KOTV* as it does now that no reliance can be placed on the studies made by these experts.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 CFR 1.276, the above-captioned application of Elba Development Corporation IS DENIED.[13]

FEDERAL COMMUNICATIONS COMMISSION
LENORE G. EHRIG, *Chief Administrative Law Judge*

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[13] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Application, Dismissal of
Financial Qualifications
Issue, Enlargement of,
Remand
Summary Decision

Dismissal of application and issuance of summary decision on financial issue reversed and case remanded to ALJ for full hearing. Applicant had diligently prosecuted its application and was entitled to a continuance because of sponsoring witness's illness. Character issues not added against competing applicant. –*GAF B/cing Company*
BC Docket No. 82–371

FCC 84R-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GAF BROADCASTING COMPANY For Renewal of License of Station WNCN(FM) New York, New York	BC Docket No. 82-371 File No. BRH-810202G7
CLASSICAL RADIO, INC. New York, New York	BC Docket No. 82-372 File No. BPH-810501AD
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: February 22, 1984; Released: March 5, 1984)

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ISSUING A SEPARATE STATEMENT

1. The Review Board has under consideration an appeal filed September 15, 1983 by Classical Radio, Inc. (Classical) from the Memorandum Opinion and Order, FCC 83M-2752, released August 16, 1983, of Administrative Law Judge Joseph P. Gonzalez (ALJ) which dismissed Classical's application in the above-captioned comparative renewal broadcast proceeding for failure to prosecute. In the same Order, the ALJ also granted summary decision against Classical on a financial qualifications issue he had previously

specified (*see* Memorandum Opinion and Order, FCC 83M-589, released February 18, 1983), granted the competing application of GAF Broadcasting Company, Inc., and terminated the proceeding. Classical's appeal also consolidates its exceptions to the ALJ's summary decision ruling. GAF filed an opposition to appeal and reply to exceptions on October 14, 1983, the Mass Media Bureau filed comments on the same date, and Classical filed a reply to GAF's opposition to appeal on October 28, 1983.[1]

2. The relevant background to the ALJ's Order is as follows. At a hearing session held June 21, 1983, Ralph M. Jennings, Classical's president and proposed general manager, as well as the sponsor of its financial exhibit, abruptly left the witness stand without explanation during *voir dire* questioning. Tr. 1151–52.[2] When Mr. Jennings could not be located, the ALJ adjourned the hearing. The next day, counsel for Classical wrote to the ALJ informing him that Mr. Jennings was under treatment for a recent ulcer problem and that his physician would shortly explain to counsel Mr. Jennings' condition and give an opinion as to when he could testify, which information would be immediately forwarded to the ALJ. By Order, FCC 83M-2106, released June 27, 1983, the ALJ continued the hearing and at a June 30, 1983 conference he set further hearing for July 21, 1983. On July 18, 1983, Classical filed a request for a further continuance supported by a letter from Mr. Jennings' physician, Dr. David Zimmerman, who stated that Mr. Jennings had always had strong emotional reactions over his legal blindness, that he was suffering from multiple peptic ulcers, that his "panic reaction" on the stand was due to anxiety over his medical condition and the stressful situation associated with it, that he was responding to treatment for his ulcer condition and should be well by the end of summer, and that he should not be subjected to the same anxiety-provoking situation, *i.e.*, hearings, before then. Also attached was an affidavit from Mr. Jennings stating that he was unwilling to testify further until his doctor indicated his condition had returned to normal. Dr. Zimmerman also addressed a telegram to the ALJ on July 19, 1983 stating that he had ordered Mr. Jennings not to testify at the scheduled July 21, 1983 hearing session based on his medical judgment that his health did not permit it.

3. The ALJ refused to credit Dr. Zimmerman's medical statements and denied Classical's request to postpone the July 21, 1983 hearing session. (*See* Order, FCC 83M-2390, released July 21, 1983).

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[1] Classical also requested oral argument. In our discretion we deny this request under Section 1.277(a) of the Commission's Rules because we do not believe that argument will aid our disposition of this case. *See Minnesota Mobile Telephone Co.*, 75 FCC 2d 221, 46 RR 2d 365 (Rev. Bd. 1979).

[2] Shortly before his departure, Mr. Jennings had stated that he was legally blind and was having difficulty reading the financial materials. Tr. 1146.

The ALJ stated that Mr. Jennings did not appear to be in physical distress prior to leaving the stand, and noted that Dr. Zimmerman's statements were unattested, unaccompanied by medical documentation, and lacking in detail concerning such matters as the date of Mr. Jennings' most recent examination or his next appointment. Following this ruling, Classical attempted to submit its financial exhibit at the July 21 session under the sponsorship of another witness, John A. Coleman, its secretary-treasurer and proposed program director, but after *voir dire*, the ALJ ruled that Mr. Coleman was not competent to testify and struck Classical's financial exhibit. Since there was no evidence of record establishing Classical's financial qualifications, the ALJ concluded that summary decision against it on that issue was warranted. He further held that Classical had failed to prosecute its application diligently and dismissed the application pursuant to Section 73.3568(b) of the Rules, 47 CFR 73.3568(b). FCC 83M-2752, *supra*.

4. In its appeal, Classical argues that the ALJ abused his discretion in denying Classical's request to reschedule the July 21, 1983 hearing session, that he erred in refusing to allow John Coleman to testify in lieu of the absent Ralph Jennings, and that he was mistaken in dismissing Classical's application for failure to prosecute. Classical also contends that the ALJ erred in granting summary decision against it on the financial issue and in fact should have resolved that issue in its favor. Finally, Classical submits that the ALJ should have enlarged the issues to add misrepresentation and corporate misconduct issues against GAF. The Board agrees with Classical that the ALJ erred in dismissing its application for failure to prosecute and issuing summary decision against it on the financial issue. We believe that remand for further proceedings on that issue and on the comparative issue is necessary. However, we affirm the ALJ's rejection of Classical's proposed character issues against GAF.

5. *Dismissal of Classical's Application*. Under this heading, three matters must be considered: first, the ALJ's denial of Classical's request for a continuance; second, his rejection of Classical's substitute sponsoring witness; and third, his conclusion that Classical had failed to prosecute its application. As to the first point, the ALJ's action dismissing Classical's application was largely predicated on his earlier refusal to grant Classical's request to postpone the July 21, 1983 hearing session on the basis of Mr. Jennings' medical condition. In this regard, we believe he erred. Although an ALJ enjoys broad discretion in regulating the course of a hearing, if his ruling is arbitrary or an abuse of discretion, it may be overturned. *WMOZ, Inc.*, 5 RR 2d 732 (Rev. Bd. 1965). This is such a case. The ALJ was informed on June 22, the day after Mr. Jennings' departure from the witness stand, that he suffered from an ulcer condition and that a supporting medical statement from his physician would be

submitted. That statement, giving the doctor's opinion as to the reason for Mr. Jennings' actions and the prognosis for his recovery, was filed on July 18 in connection with Classical's request for a further continuance and was followed a day later by the physician's statement that he had ordered his patient not to testify at the July 21 hearing. Although lacking in some detail, as the ALJ noted, Dr. Zimmerman's July 18 statement was quite specific in indicating that Mr. Jennings had a serious health problem and was experiencing considerable anxiety over it, that this anxiety had probably been the cause of his "panic reaction" on the stand, and that he could be expected to have sufficiently recovered to testify "by the end of summer."

6. In these circumstances, the fact that Dr. Zimmerman's statement was unsworn and not accompanied by medical documentation did not vitiate its reliability, as the ALJ appeared to believe, particularly since counsel informed the ALJ by letter dated July 20 that Mr. Jennings had consented to the ALJ consulting with Dr. Zimmerman "should there be any question regarding [Mr. Jennings'] medical condition." Classical Appeal, Att. C.[3] While we do not condone Classical's failure to apprise the ALJ about Mr. Jennings' condition until three days prior to the scheduled hearing on July 21, we believe this factor by itself did not afford a sufficient basis for denying a reasonable continuance (until the end of the summer) so that Mr. Jennings could testify. In view of Mr. Jennings' importance to the applicant's presentation of its case, the medical information then available to the ALJ, and his option to seek further corroboration or detail from the physician, it was error not to reschedule the hearing. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 834 n. 5, 50 RR 2d 1117, 1122 n. 5 (Rev. Bd. 1981).

7. The ALJ also ruled that John Coleman, a Classical principal who was offered as a substitute witness at the July 21 hearing to sponsor its financial exhibit, was not competent to testify and that the exhibit would therefore be struck. Tr. 1219, 1230. Upon review of Mr. Coleman's testimony, which we now summarize, we again believe the Judge erred. On *voir dire*, Mr. Coleman testified that he had prepared for the hearing by intensely reviewing Classical's financial exhibit in the previous 48 hours, that he had gone over it with counsel and confirmed the viability of the specific technical cost figures in a brief conversation with Alan Quinn of Hertz Corporation's Commercial Leasing Division, Classical's equipment supplier, but that he had not spoken with Mr. Jennings, or Matt Edwards, a consultant, who together with Jennings had prepared the cost

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[3] Although the ALJ's Order, FCC 83M-2390, denying Classical's request to reschedule the hearing, was adopted the day before counsel's July 20 letter and released the day after, the ALJ could have on his own motion initiated further inquiry of the doctor and reconsidered his Order in the interests of a fuller inquiry into the matter.

estimates, and had no personal knowledge of the cost figures. Tr. 1197–1211. He did know that Jennings and Edwards had prepared the equipment cost estimates with the advice and cooperation of Hertz and that Classical had employed a consulting engineer, Herman Hurst, to review its equipment proposal. Tr. 1204, 1223, 1224–5.

8. Thus it appears that Mr. Coleman's only failing as a sponsoring witness was his lack of personal knowledge as to the cost estimates for Classical's technical equipment. Indeed he was not challenged on Classical's other cost estimates or on any other aspect of its financial proposal even though he testified that he had reviewed the entire exhibit. He was able to confirm that the equipment figures had been prepared by Mr. Jennings and Mr. Edwards after discussion with the equipment lessor, had then been reviewed by another consultant for Classical, and that he had briefly verified the figures with the supplier. We believe this was sufficient to permit Mr. Coleman to sponsor the exhibit, particularly in these unusual circumstances where Classical was hurriedly attempting to fill in for Mr. Jennings, who had more direct knowledge but was unavailable. An applicant may generally rely on cost estimates if they are specific and reasonable on their face, and we believe the better course here would have been for the ALJ to allow Mr. Coleman to sponsor the exhibit and for GAF, if it questioned the validity or reasonableness of individual items, to then call witnesses who could rebut Classical's figures. *Cf. James B. Francis*, 41 FCC 2d 303, 27 RR 2d 1337 (Rev. Bd. 1973). In short, we find Mr. Coleman was competent to sponsor the financial exhibit.[4]

9. It follows from the foregoing discussion that the ALJ erroneously dismissed Classical's application for failure to prosecute pursuant to Section 73.3568(b). In fact, Classical was diligent in pursuing its application first by sponsoring its financial showing via Mr. Jennings and then, when he was unable to continue and the ALJ was unwilling to postpone the hearing, by attempting to proceed on schedule with Mr. Coleman. None of the cases cited by GAF in which dismissals have been upheld is at all comparable.[5] Unlike the cited

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[4] Contrary to Classical's claim at Br. 15, the Coleman competency matter does bear on the issues in the case since its cost estimates were specifically in issue, *see* FCC 83M-589, *supra*, and summary decision on that issue had been denied, *see* FCC 83M-1913, released June 13, 1983.

[5] Thus, in *Vue-Metrics, Inc.*, 69 FCC 2d 1049, 44 RR 2d 615 (1978), the applicant failed to comply with repeated orders to produce available and relevant documents; in *Unlimited Service Organization*, 20 FCC 2d 1089, 18 RR 2d 197 (1970), the applicant failed to respond to Commission correspondence and telephone requests for financial information affecting its application; in *Filmway of Wisconsin*, 54 RR 2d 913 (Rev. Bd. 1983), the applicant did not comply with publication requirements or submit information required in the designation order, and did not respond to a petition to enlarge or a notice of deposition; in *Faith Center, Inc.*, 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983), the applicant, relying

cases, Classical has not been accused of failing to comply with discovery or other requests for information, has not been unresponsive to orders of the ALJ, or caused undue delay or disruption to the hearing, and has not otherwise indicated abandonment or nonserious pursuit of its application. *Cf. Progress Broadcasting Corp.*, 3 RR 2d 542 (Rev. Bd. 1964). Its inability to produce a witness because of the witness's illness and its diligent but unsuccessful proffer of a substitute witness hardly amount to a failure to prosecute and therefore do not justify the "very grave step" of dismissal. *See Lyman S. Cox, Jr.*, 92 FCC 2d 1262, 52 RR 2d 1543 (Rev. Bd. 1983). The ALJ's ruling will be reversed and the case remanded for further hearing.[6]

10. *Summary Decision re Financial Qualifications*. After rejecting Mr. Coleman's proposed sponsorship of the financial exhibit, the ALJ held that "There being no evidence of record addressing Classical's financial qualifications," the applicant had failed to carry its burden of proof and summary decision against Classical under that issue would be granted. FCC 83M-2752, para. 11. Classical excepts to this conclusion as being procedurally erroneous and argues that the ALJ should have granted summary decision in its favor on the basis of its earlier motion which was denied by Memorandum Opinion and Order, FCC 83M-1913, *supra* n. 4.

11. Summary decision, which is an extraordinary procedure because it truncates the need for a full hearing, may only be granted when the presiding officer determines that "there is no genuine issue as to any material fact . . . . " Section 1.251(d) of the Rules, 47 CFR 1.251(d); *Big Country Radio, Inc.*, 50 FCC 2d 967, 32 RR 2d 1119 (Rev. Bd. 1975). In making this determination, and in order to ensure administrative due process, the ALJ must carefully scrutinize the moving party's showing; even if he finds that the facts are undisputed, he nevertheless has discretion to proceed with the

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on Constitutional arguments previously rejected by the Commission and court of appeals, refused to respond to valid discovery requests or to produce relevant witnesses for depositions; in *Sco-Kim, Inc.*, 90 FCC 2d 960, 51 RR 2d 1427 (Rev. Bd.), *rev. denied*, FCC 82-463, October 28, 1982, dismissal was based on the applicant's failure to respond to a number of important motions and its late and nonresponsive answers to interrogatories and a request for admissions even after being directed to respond by the ALJ; and in *Lebanon Valley Radio*, 11 FCC 2d 31, 11 RR 2d 998 (Rev. Bd. 1967), and *Reliable Broadcasting Co.*, 25 RR 93 (Rev. Bd. 1963), applicants were dismissed for failure to comply with local notice requirements and failure to exchange hearing exhibits.

[6] In contrast to the present case, compare *Texan Broadcasting Co., Inc.*, 49 RR 2d 1287 (Rev. Bd. 1981), where an ALJ properly rejected a hearing exhibit because the applicant failed to produce the sponsoring witnesses who had prepared the exhibit despite notification by the other parties that the witnesses were desired for cross-examination. No explanation was offered for this failure other than that "They just can't come here at this time." Nor did the applicant request a continuance or give any indication that the witnesses could be produced at any other time. *Id.* at 1289. *See also Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 50 RR 2d 1546 (Rev. Bd. 1982).

hearing if he deems it desirable in view of the nature of the proceeding or the surrounding circumstances. *Summary Decision Procedures*, 34 FCC 2d 485, 487, 24 RR 2d 1715, 1717 (1972); *Midwest St. Louis, Inc.*, 79 FCC 2d 519, 529, 48 RR 2d 95, 104 (1980). It is apparent from the ALJ's dismissal order here that summary decision against Classical was based entirely on a failure of proof because the applicant was unsuccessful in having its financial showing placed in evidence. While a failure to produce evidence under a designated issue may form the basis for summary decision, *see Texan Broadcasting Co., Inc.*, supra n. 6, we do not find such a ruling to be appropriate here. Unlike the situation in *Texan*, Classical made serious and good faith efforts to place its financial showing in evidence, and did not willfully default in the prosecution of its case. Therefore, and considering the unusual circumstances surrounding the erroneous dismissal of its application (see paragraphs 5–9, *supra*), we believe it was also incorrect for the ALJ to issue summary decision against Classical.[7] Accordingly, we will remand the case to afford Classical a further opportunity to establish its financial qualifications.

12. The Board will not, however, grant Classical's exception to the ALJ's refusal in FCC 83M-1913 to award summary decision in its favor. In adding the financial qualifications issue (which included inquiry into both its cost estimates and availability of funds), the ALJ noted that if Classical corrected related deficiencies in its technical proposal, he would consider accepting a certification and motion for summary decision. FCC 83M-589, *supra*, n. 2. Classical did amend its technical and financial proposals and, in connection with the latter amendment, filed May 23, 1983, it also submitted as part of its certification a statement from Mr. Jennings explaining the steps it had taken to establish its financial qualifications. The ALJ in FCC 83M-1913 accepted the amendment reflecting the additional financial information but, taking note of the Commission's recent opinion in *South Florida Broadcasting Co., Inc.*, 53 RR 2d 1683, released June 2, 1983, he held that Classical must establish its financial qualifications by a full documentary showing. Accordingly, he denied the motion for summary decision. Classical now argues that its certification and amendment did contain the complete financial showing required by *South Florida* and that summary decision was therefore appropriate.

13. The Board will not reach the question whether Classical's showing made in conjunction with its May 23, 1983 amendment and certification was adequate to justify summary decision in its favor. It is evident from the ALJ's Order denying summary decision that he

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[7] The ALJ's procedural errors in not issuing a separate Summary Decision under the dispositive financial issue (*see* Section 1.251(e), 47 CFR 1.251(e)), and in dismissing rather than denying the application are harmless since we are reversing both rulings on their merits.

never considered Classical's substantive showing on the merits but merely ruled as a procedural matter that *South Florida* precluded his acceptance of Classical's certification. Because this case is being remanded for further proceedings in any event, we believe it would be appropriate for the trier of fact in the first instance to pass upon the merits of Classical's showing and determine whether summary decision in whole or in part[8] is called for or whether a full hearing is needed.

14. *Misrepresentation Issue.* Classical excepts to the ALJ's Memorandum Opinion and Order, FCC 83M-567, released February 17, 1983, wherein he denied its August 23, 1982 petition to enlarge issues against GAF. The first issue Classical sought was to determine whether GAF made misrepresentations or lacked candor regarding its intentions to sell Station WNCN. The petition alleged that GAF Corporation, the licensee's parent, made inconsistent representations to various governmental agencies to whom it owed a duty of accurate disclosure as to whether it would sell the station. Specifically, Classical alleged that when GAF acquired the station in 1976, it obligated itself pursuant to a settlement agreement to operate it for at least five years as primarily a classical music station or to sell the station if it no longer wished to operate it in that manner. Classical asserts that Concert Radio Inc., a dismissing applicant, was offered an option to buy during that five year period. *See Starr WQIV, Inc.*, 59 FCC 2d 257, 36 RR 2d 1692 (1976). On December 29, 1980, Classical continues, GAF's board of directors adopted a resolution authorizing the sale of Station WNCN as part of a major corporate reorganization, announced this plan publicly the following day, and reported the same to the SEC in January 1981 and in a credit agreement with several banks. Notwithstanding these statements, Classical submits, GAF stated in litigation over the option brought by Concert Radio in a New York State court that it was not offering the station for sale, informed the SEC on March 31, 1982 that the station was not to be sold, and on June 1, 1982 told this Commission that "no final decision to sell WNCN" had been made. Br. at 39. Thus, Classical concludes, GAF misrepresented its intentions regarding sale of Station WNCN to one or more of these agencies.

15. We agree with the ALJ that no issue was warranted. GAF has adequately explained in its responsive pleadings that in order to improve its financial position it announced its intention to offer eight businesses, including Station WNCN, for sale in December 1980 and withdrew the station from this plan in March 1982 before it completed its redeployment; therefore, it correctly informed the SEC that Station WNCN was part of its reorganization plan when that

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[8] We note that Classical, at Br. 31, n. 10, is willing to accept at least a partial remand on the availability of funds aspect of the issue and that both GAF, at Br. 24, n.25, and the Bureau, at Br. 14, have specific objections to Classical's financial showing.

was the case, notified it when the station offering was withdrawn, and similarly accurately represented to the Commission and the New York State court that the station was not being sold.[9] Thus GAF's apparent inconsistencies have been elucidated[10] and Classical has offered only unsupported speculation (*e. g.*, GAF would have jeopardized its renewal expectancy had it acknowledged its true intentions to the Commission) for inferring that a misrepresentation was intended. While it characterizes GAF's explanations as self-serving (Br. at 33), Classical in no way rebuts them. As we have often said, the mere existence of facial discrepancies without a showing of a desire, motive, or logical reason to mislead does not satisfy a petitioner's burden of making a *prima facie* demonstration of deception. *See Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1180, 49 RR 2d 1001, 1007 (Rev. Bd. 1981). Classical has not carried its burden here.

16. *Corporate Misconduct Issue*. The second issue requested by Classical in its August 23, 1982 petition was to determine whether GAF misled its stockholders, misrepresented to consumers, disregarded the health and safety of consumers and its employees, and violated its employees' equal employment opportunity rights. After due consideration of the nature of the alleged acts of misconduct, their lack of frequency or currentness, and their lack of relationship to GAF's broadcast activities, we are in agreement with the ALJ that Classical's broad allegations do not warrant an issue. First, the purported misleading of stockholders refers to an SEC-type dispute between GAF and one of its shareholders, but there is no indication that this shareholder has taken legal action over the dispute or that the SEC has seen fit to take action. We have regularly declined to intervene in matters of this kind where they have not first been presented to or acted upon by the appropriate local forum or sister agency. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 806-7, 51 RR 2d 409, 414 (Rev. Bd. 1982), *rev. denied*, FCC 83–368, released September 15, 1983; *Gilbert Broadcasting Corp.*, 55 FCC 2d 579, 584, 34 RR 2d 1673, 1681 (Rev. Bd. 1975).[11] The consumer misrepresentation charge is based on two judgments against GAF for installation of defective roofing materials; GAF responds that one of the judgments has been

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[9] Whether GAF's 1980 "offering for sale would trigger" Concert's option, as Classical states at Br. 34, is a matter apparently at issue in the New York State litigation and not relevant to our determination. See GAF Br. 26.

[10] Further corroboration derives from an affidavit of GAF's Chairman, Jesse Werner, submitted as Exh. B. to an August 23, 1982 GAF motion to enlarge issues, which explains that GAF always hoped not to have to sell WNCN and intended, if it were to be sold, to sell it to someone who would continue it as a classical music station. Exh. B., paras. 19–23.

[11] As we noted in *Country Broadcasting Co.*, 93 FCC 2d 83, 84 n.3, 53 RR 2d 293, 294 n.3 (Rev. Bd. 1983), the Commission's general hands-off policy has not been applied in all circumstances; however, on the allegations in this case, we believe that non-intervention is consistent with the weight of precedent.

reversed, the other is on appeal, and the roofs were installed in 1970 by a GAF subsidiary. On its face, the single adverse judgment is both remote in time and unrelated to GAF's ability to function as a responsible future licensee; in addition, it is apparent that the matter is not finally adjudicated, and, in these circumstances, we deem it inappropriate to add an issue to explore it. *See CBS, Inc.*, 48 FCC 2d 474, 31 RR 2d 128 (Rev. Bd. 1974).

17. Similarly, Classical's charge that GAF has disregarded the health and safety of consumers of its products is based on GAF's status as a co-defendant in a number of asbestos-related lawsuits. Again these matters have not as yet been finally adjudicated, and their nexus with GAF's future performance and reliability as a broadcaster has not been shown. As to the health and safety of its employees, GAF specifically refutes the charge that it deprived its employees of required medical examinations contrary to the judicial definition of its OSHA obligation in *GAF Corp.* v. *Occupational Safety and Health Review Committee*, 561 F.2d 913 (D.C. Cir. 1977). And GAF points out that Classical's citation of a recent OSHA violation by GAF involved a finding of airborne contaminants in a plant it closed in 1978. This incident alone does not establish a willful violation of law or a pattern of recurring violations reflecting on GAF's ability to operate a broadcast station in the public interest. *See Post-Newsweek Stations, Florida, Inc.*, 55 FCC 2d 172, 34 RR 2d 1410 (Rev. Bd. 1975). Finally, Classical asserts that GAF's renewal application reflects six instances of equal employment law violations. As GAF pointed out in its opposition to the petition to enlarge, however, none of the cases involved Station WNCN employees and five were settled without a determination that the law was violated; the sixth, a judgment of religious discrimination, does not by itself appear to present a serious question as to GAF's future functioning as a licensee. In sum, Classical's allegations relate entirely to GAF's non-broadcast activities, are either refuted or refer to remote or isolated incidents rather than a pattern of misconduct, and generally fail to establish a predictive nexus between the nature of the misconduct and the licensee's future broadcast behavior, including its ability to abide by the Commission's regulatory laws and policies. *See Uniform Policy on Violation of Laws*, 42 FCC 2d 399 (1951). Under these circumstances, the ALJ properly declined to add the requested issue.

18. *Conclusion*. Based on the foregoing review, we reverse the ALJ's dismissal of Classical's application and his issuance of summary decision against it under the financial qualifications issue, and we remand the case for further proceedings under that financial issue. We also vacate the grant of GAF's application and direct the ALJ to proceed with the already-designated comparative renewal hearing.

19. ACCORDINGLY, IT IS ORDERED, That the appeal filed

September 15, 1983 by Classical Radio, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects; and

20. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for further action in accordance with this opinion.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Separate Statement
of
Board Member Norman B. Blumenthal

I fully join my colleagues in their temperate and well-considered disposition of this appeal, but in so doing do not wish to intimate any great disapprobation in respect to the ALJ's conduct of the proceeding. Although the Board's action indicates a higher "patience" threshold at this remote level, the ALJ's dismissal of Classical's application was not wholly without arguable justification.

The operative cause for the ALJ's dismissal was Classical's failure to prosecute after the ALJ denied it a last-minute continuance to present its financial showing at hearing on July 21, 1983.[1] The continuance was requested on allegations that Classical's principal, Ralph M. Jennings, had suffered a "panic reaction" to participation at a hearing, and that he was "anxious over his medical condition," which condition apparently included ulcers.[2] Although Jennings had abandoned a prior hearing session (on June 21, 1983) under unusual circumstances,[3] Classical did not then assert any serious physical impairment, nor did it at a later prehearing session specifically called to advise the ALJ of anything relevant to the future conduct of the hearing.[4]

Classical's July 18, 1983 surprise request for an "indefinite" continuance was attended by a July 15 affidavit from Jennings declaring categorically that he was unwilling to testify until his personal physician, Dr. David Zimmerman, advised Jennings that his health had "returned to normal."[5] Dr. Zimmerman provided a letter which asserted that Jennings "is now responding to treatment" and "will be well by the end of summer."[6]

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[1] *See generally Memorandum Opinion and Order*, FCC 83M-2752, released August 16, 1983 ("*MO&O*").

[2] *See id.*, at para. 9. Despite many pleadings, it remains unclear just what the relationship is, if any, between Jennings' diagnosed ulcers and his inability to discuss Classical's financial proposal; or whether his "anxiety" is related to either—or both.

[3] *See id.*, at para. 5 (where the ALJ records that Jennings was "highly agitated").

[4] *See id.*, at para. 8.

[5] Jennings Affidavit (*quoted at* Classical Br. at 7).

[6] Zimmerman Letter (*quoted at* Classical Br. at 6) (no historical pun intended).

Because Classical had not previously advised the forum of Jennings' alleged infirmities, and because Dr. Zimmerman's letter was exceedingly vague to the point of crypticism—*e.g.*, it never explained Jennings' "underlying stressful situation"[7] —the ALJ denied the continuance. Classical offered another sponsoring witness, John A. Coleman. Coleman—it appeared —was not competent to testify on the financial issue, and in the succeeding chain of events, Classical's application was dismissed.[8]

It is evident that Classical's conduct was both peculiar and erratic. It is also true that its request for an "indefinite" continuance, until Jennings' personal physician determined—in the fullness of time?—that Jennings' health had "returned to normal," strained the limits of procedural latitude.[9] Nonetheless, the absolute dismissal of an application is an extraordinary action to be employed only upon high provocation or in the face of the clearest failure to prosecute within reasonable limits. By reference to case precedent, Classical's actions did not yet reach the dismissal level, *see, e.g.*, *Faith Center, Inc.*, 52 RR 2d 1547 (Rev. Bd. 1983); *Sco-Kim, Inc.*, 90 FCC 2d 960 (Rev. Bd. 1982), *review denied*, FCC 82-463, October 28, 1982; and a brief continuance would have been more in keeping with our general standard of tolerance.[10]

On the other hand, our remand here should not be read to require either "indefinite" or undue interruptions to fair or timely administrative process. Should Classical hereafter demonstrate that it is not *ready, willing, or able* to prosecute its application, or that dilatory tactics are being used to improve its litigative position, dismissal surely would be justified. Both the licensee and the public are entitled to a prompt adjudication and a final choice, as well as to the incentives to good broadcasting provided by stability in licenseeship. *See Greater Boston Television Corp.*v. *FCC*, 444 F.2d 841, 858 (D.C. Cir. 1970) (Leventhal, J.).

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[7] *Id.*

[8] *MO&O*, para. 11.

[9] It is recognized that Dr. Zimmerman anticipated in mid-July that Jennings "will be well by the end of summer." However, that refreshingly exact prognosis suggests that Dr. Zimmerman's speciality may be closer to botany than anatomy, since the study of tea leaves would here seem more authoritative, given the vast complexities of human anxiety. Albeit, while Jennings is certainly entitled to sincere compassion for his physical ailments, it may be that his health condition(s) may impose real limitations to his ability to help prosecute the application. But then, we all must strive within our individual physical bounds.

[10] In view of Classical's request for an "indefinite" continuance and Jennings' insistence that he would not testify unless his personal physician warranted that his health had "returned to normal," it is not certain that Classical would have accepted a finite continuance. Notwithstanding, and in view of Dr. Zimmerman's prognosis, the grant of a six-week deferral would not have been unreasonable. As is true of all appellate tribunals, though, our views are informed with the hindsight unavailable to the presiding official.

Candor
Ownership & Management Integration of
Real Party In Interest
Site Availability
Site Location

In hearing matter of mutually exclusive applications for FM broadcast station, Review Board affirmed ALJ's grant. Board affirmed ALJ's resolution of certification and misrepresentation/lack of candor issues in favor of winning applicant and conclusion that integration criterion was decisional in this case. -*High Sierra B/cing, Inc.*
BC Docket No. 81–637

FCC 83R–101

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HIGH SIERRA BROADCASTING, INC. Tahoe City, California	BC Docket No. 81–637 File No. BPH-800118AJ
John M. Simpson, Mary Carmen Simpson and Laura E. Simpson, d/b/a CASCADE COMMUNICATIONS COMPANY Tahoe City, California	BC Docket No. 81–638 File No. BPH-800731AC
TAHOE CITY WIRELESS, LIMITED Tahoe City, California	BC Docket No. 81–639 File No. BPH-800829AD
MINORITY BROADCASTERS OF TAHOE, INC. Tahoe City, California	BC Docket No. 81–640 File No. BPH-800829AI
R.D. Russell, L.R. Grady, J.A. Schmitt, N.W. Hughes, and B.S. Hughes, d/b/a NORTH TAHOE BROADCASTING COMPANY Tahoe City, California	BC Docket No. 81–641 File No. BPH-800829AM

Donna L. Heinle, John S. MacInnis, Sadako Okino Decollo, Virginia Hsieh Le Roux, Dorothy Standing Bear Pellerin and Frances Strychaz, d/b/a	
THE WOMEN'S NETWORK, a Limited Partnership Tahoe City, California	BC Docket No. 81–642 File No. BPH-800829AW
Chris W. Kidd, David L. Metts and Geneva H. Heavin, d/b/a	
NORTH SHORE BROADCASTERS Tahoe City, California	BC Docket No. 81–643 File No. BPH-800829BE
For Construction Permit for a New FM Station	

Appearances

A. Harry Becker, on behalf of High Sierra Broadcasting, Inc.; *Thomas L. Siebert*, on behalf of Cascade Communications Company; *Lawrence E. Carr, III*, on behalf of Minority Broadcasters of Tahoe, Inc.; *Jerrold D. Miller*, on behalf of North Tahoe Broadcasting Company; *John S. MacInnis*, on behalf of The Women's Network; and *Chris W. Kidd*, on behalf of North Shore Broadcasters.

DECISION

(Adopted: December 15, 1983; Released: December 22, 1983)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of High Sierra Broadcasting, Inc. (High Sierra), Cascade Communications Company (Cascade), Tahoe City Wireless, Limited (TCWL), Minority Broadcasters of Tahoe, Inc. (Minority), North Tahoe Broadcasting Company (NTBC), The Women's Network (Network), and North Shore Broadcasters (North Shore) for authority to construct a new FM broadcast station to operate on Channel 243 at Tahoe City, California. By *Hearing Designation Order*, 46 FR 47488, published September 28, 1981, the applications were designated for consolidated hearing on certification and misrepresentation/lack of candor issues against Cascade; financial issues against TCWL, Minority, NTBC, Network, and North Shore; and the standard comparative issue. Subsequently, the issues were enlarged by the presiding Judge to include a financial issue against High Sierra; a reporting issue against TCWL; a site suitability issue against High

Sierra, TCWL, Minority, NTBC, and Network; and harassment issues against High Sierra.[1]

2. In an Initial Decision (I.D.), FCC 83D-30, released June 8, 1983, Administrative Law Judge John M. Frysiak (ALJ) granted Cascade's application. In so doing, he resolved the basic qualifying issues in favor of the respective applicants,[2] assessed a very slight demerit against TCWL for reporting violations, and concluded that Cascade's application was to be preferred under the comparative issue. Cascade received a "substantial" integration preference over Network, NTBC, and TCWL and an "overwhelming" integration preference over High Sierra, Minority, and North Shore. Additionally, Cascade, Minority, NTBC, and Network each received a slight diversification preference over High Sierra, TCWL, and North Shore. Finally, Cascade and Minority were awarded very slight preferences for proposing auxiliary power sources. The applicants were ranked in the following order: Cascade, NTBC, TCWL, Network, Minority, North Shore, and High Sierra.

3. This proceeding is now before the Review Board on exceptions filed by all of the applicants except TCWL. Because TCWL did not file exceptions, its application will be dismissed with prejudice for failure to prosecute, pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR 1.276(f). The exceptions to the I.D. relate solely to the ALJ's findings and conclusions under the integration and diversification criteria of the comparative issue and the certification and misrepresentation/lack of candor issues against Cascade. The remaining exceptions pertain to the ALJ's failure to add real-party-in-interest/lack of candor, certification/misrepresentation, and "site location" issues against Cascade, and a site availability issue against Minority, NTBC, and Network. The Board has reviewed the I.D. and the ALJ's challenged rulings in light of the exceptions and reply briefs, the oral argument held on October 20, 1983, and our examination of the record. We affirm the ALJ's rulings and adopt his findings and conclusions, except as modified herein, and agree with his ultimate conclusion that a grant to Cascade would best serve the public interest, convenience and necessity.

Integration of Ownership and Management

4. *Cascade.* Cascade is a general partnership composed of three

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[1] *See* Memorandum Opinions and Orders, FCC 82M-0043, released January 8, 1982; FCC 82M-0112, released January 12, 1982; FCC 82M-0123, released January 18, 1982; FCC 82M-0522, released February 18, 1982, respectively.

[2] Previously, the ALJ had awarded summary decisions in favor of TCWL, NTBC and Minority on the financial issues (see Memorandum Opinions and Orders, FCC 81M-3659, released November 17, 1981; FCC 81M-4121, released December 30, 1981, and FCC 82M-0111, released January 12, 1982, respectively, and in favor of High Sierra, TCWL, Minority, NTBC, and Network on the site suitability issue (Memorandum Opinion and Order, FCC 82M-0578, released February 23, 1982).

partners, all of whom propose to work full time at the station in managerial positions. I.D., paras. 34, 36–38. The partners, John W. Simpson, Mary C. Simpson, and Laura E. Simpson, are siblings; John Simpson will be the general manager, Mary Simpson, the program director, and Laura Simpson, the news director. *Id.* The ALJ concluded that Cascade was entitled to 100% quantitative integration credit, which is challenged by NTBC, Minority, and Network. Relying on *Henderson Broadcasting Co., Inc.* , 63 FCC 2d 419, 39 RR 2d 1099 (Rev. Bd. 1977), and *Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 1325 (Rev. Bd. 1978), exceptors contend that the ALJ should not have credited Cascade's integration proposal at all, or should have given it reduced credit, since the principals have not invested any funds in the applicant and their father has paid all the expenses in preparing and prosecuting the application. Alternatively, NTBC contends that even if the principals are considered *bona fide*, the integration proposals of Mary and Laura Simpson should not be credited since their duties are primarily non-managerial.

5. We concur with the ALJ that Cascade is entitled to 100% quantitative integration credit. Initially, exceptors' reliance on *Berryville, supra*, and *Henderson*, *supra*, for rejecting the integration proposals of the Cascade principals is misplaced. In *Berryville*, the Board found that two purported partners were not true and actual owners, a prerequisite for integration credit, and thus disallowed their integration proposals. Whereas partners generally are deemed to have an equal voice in management, the record reflected there that exclusive management resided in a third party by virtue of a special agreement and that the two other partners' participation would be limited to making suggestions to the managing partner. Moreover, the two ostensible partners had not contributed cash as called for by the partnership agreement. *Id.* at 5, 10–11, 44 RR 2d at 1331, 1336. Here, in contrast, there is no indication that the principals will not be true and actual owners in a financial sense or that they will not be engaged in serious managerial positions. John A. Simpson, the principals' father, has averred in an uncontroverted affidavit that he will not control or attempt to control the operation of the proposed station in the event Cascade's application is granted; moreover, as a result of his loans, each of the partners has the funds needed to meet their capital contributions to the partnership. *See*Simpson affidavit attached to Cascade's April 22, 1982 opposition to joint petition, Appendix C.

6. In *Henderson*, the Board disallowed an integration proposal after piercing the corporate structure of the applicant based on the fact that the applicant was dominated by one individual possessing the power to fire the integrated 100% voting stockholder. Here, as noted above, the Simpsons' father has averred that he will not control the operation of the applicant, even in the event of a default by the applicant or individual partners on any loan he has made to

them or guaranteed on their behalf. Simpson affidavit, *supra*. In the absence of contrary evidence, the principals must be considered the true and actual owners of the proposed station. Furthermore, NTBC's alternative exception that Cascade should not receive credit for Mary and Laura Simpson's integration proposals since they will not work in managerial positions is without merit. Neither principal testified that she would be substantially involved in non-managerial duties as implied in NTBC's arguments (NTBC's Br. 6–7); *see*Tr. 469–70, 509–511. Rather, both propose to serve full time in traditional managerial positions, *i.e.*, program director and news director, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395, 5 RR 2d 1901, 1909-1910 (1965), and that is all that is required to entitle them to integration credit.

7. *NTBC*. NTBC is a general partnership consisting of five partners, three of whom, L. R. Grady, N. W. Hughes, and Beverly Hughes, owning 25%, 12.5%, and 12.5% of the partnership, plan to devote full time to the station as general manager, sales manager, and program director, respectively. I.D., paras. 70–73. The remaining partners, Richard Russell and J. A. Schmitt, each with a 25% partnership interest, propose to work a minimum of 20 hours per week; Russell will assist in purchasing and maintaining the transmitting and studio equipment, and Schmitt will serve as assistant sales manager and assistant program director. I.D., paras. 74, 76. The ALJ credited NTBC with 50% full-time and 0% part-time quantitative integration. NTBC contends in its exceptions that it is entitled to 60% full-time integration credit, since three of its five partners are to be integrated full time, and 40% part-time integration credit for Russell and Schmitt.

8. NTBC indeed deserves 60% full-time quantitative integration credit for the three partners who will work full time at the station because the NTBC partnership agreement provides that each of its five partners shall have equal authority in the management, control, and supervision of the partnership. NTBC Exh. 3. The Board has previously held that an applicant is entitled to the percentage of quantitative integration credit that accurately reflects the extent of legal authority and voting power the integrated owners possess to implement station policy decisions. *See Communications Properties, Inc.*, 92 FCC 2d 45, 52 RR 2d 981 (Rev. Bd. 1982), *review denied*, FCC 83–320, released July 7, 1983; *WHW Enterprises, Inc.*, 89 FCC 2d 799, 816-17, 51 RR 2d 409, 420–21 (Rev. Bd. 1982), *review denied*, FCC 83–368, released September 15, 1983. Here, the three full-time integrated partners will each have a one-fifth voice in the implementation of day-to-day station policy decisions, and thus the applicant is entitled to an aggregate of 60% full-time credit. NTBC is not, however, entitled to credit for the part-time proposals of Russell and Schmitt.

9. The ALJ correctly disallowed credit for Russell's participation at the station since he would be primarily involved in equipment

maintenance and technical matters rather than management functions. *Cf. New Continental Broadcasting Co.*, 88 FCC 2d 830, 839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981). *Poet's Seat Broadcasting Co., Inc.*, 78 FCC 2d 1080, 47 RR 2d 1265 (Rev. Bd. 1980), cited by NTBC for the proposition that integration credit is awarded to persons with technical responsibility for a station, is inapposite. There, credit was given to an individual who proposed to work full time as the station's general manager, program director, and chief engineer, notwithstanding that some of his engineering functions were not at a policy level. *Id* . at 1084, 47 RR 2d at 1268–1269. The Board emphasized that credit would be awarded because he would spend all his working time at the station running it as the full-time general manager. *Id.* Similarly, the Board will not overturn the ALJ's conclusion that Schmitt's role as assistant sales manager and assistant program director is too imprecise to warrant credit since he would have no day-to-day responsibilities for either sales or programming. I.D., para. 109. We also doubt that part-time assistant positions, such as we have here, are entitled to meaningful integration credit as a general matter. The *Policy Statement*, *supra*, which lists certain positions that will be accorded particular weight in the integration analysis, does not include assistant positions, and while positions of less than ultimate responsibility are to be "considered," particularly if they are full-time, they "cannot be given the decisional significance" attributed to the integration of owners exercising policy functions. *Id.* at 395, 5 RR 2d at 1909–1910. In any event, our concern is heightened here by the lack of adequate explanation concerning what Schmitt will do on a day-to-day basis at the station. Hence, no credit is warranted.

10. *Network*. Network is a limited partnership with two general partners, John S. MacInnis, a 31.91% owner, and his wife, Donna L. Heinle, a 53.19% owner; four limited partners own the remaining 14.9%. MacInnis will work full time as general manager of the station and his wife, a medical doctor, proposes to devote in excess of 80 hours per month to station programming and management. I.D., para. 110. Dr. Heinle would meet her commitment primarily by working eight hours per day during a consecutive nine-day period when she is not engaged in her medical practice. *Id.* at para. 79. The ALJ credited Network with 31.91% full-time quantitative integration credit for MacInnis' proposed participation at the station. However, he concluded that Network was not entitled to credit for Dr. Heinle's proposal since she does not propose to devote at least 20 hours *perweek*to management functions and because her proposal is too imprecise. I.D., para. 110. Network challenges these conclusions, contending initially that MacInnis and Heinle are entitled to at least 85.1% undivided integration credit under the doctrine of spousal "unity of interest" enunciated by the Board in *Absolutely Great Radio, Inc.*, 93 FCC 2d 1, 53 RR 2d 97 (Rev. Bd. 1983), even before the

limited partners' interests are considered. And, in this regard, Network contends that it was error to reduce a potential 100% integration proposal by the 14.9% held by the four limited partners because their interests are not relevant in determining integration. Lastly, Network argues that the ALJ erred in denying credit for Dr. Heinle's proposed role at the station.

11. As an initial matter, the principle enunciated by the Board in *Absolutely Great Radio, Inc., supra,* concerning common spousal ownership interests was explicitly overruled by Memorandum Opinion and Order, FCC 83–464, released October 13, 1983, wherein the Commission held that integration credit could not be awarded to spouses unless there was actual participation and legal ownership physically comingled. *Id.* at para. 6. Thus, Dr. Heinle can only be credited for her actual participation, and since she does not propose to work full time at the station, Network cannot receive full-time integration credit for her. Moreover, Network is not entitled to part-time integration credit for Dr. Heinle since she will not devote sufficient time at the station each week. *See Midwest Broadcasting Co.,* 70 FCC 2d 1489, 1495, 45 RR 2d 1, 7 (Rev. Bd. 1979), *review denied,* FCC 79–397, released June 21, 1979, where a minimum of 20 hours per week was established as the cut-off point for part-time integration credit. Network argues that it is sufficient to devote 80 hours per month, as Dr. Heinle proposes, to be entitled to part-time credit rather than to devote 20 hours each and every week, citing *Greater Wichita Telecasting, Inc.,* 90 FCC 2d 1046, 51 RR 2d 1604 (Rev. Bd. 1982), as controlling. We disagree. In *Greater Wichita,* the individual seeking and receiving part-time credit proposed to devote 20 hours per week to the station. *Id.* at 1050, 51 RR 2d at 1607. In contrast, Dr. Heinle's attendance at the station would be primarily during a nine-day interval each month. Although the aggregate number of hours devoted to the management of stations by owners is indeed important, the timing of that participation is equally important since the underlying rationale of the integration criterion is that day-to-day participation at the station by owners is more likely to ensure a greater sensitivity to an area's changing needs and to programming designed to serve those needs. *See Policy Statement, supra,* at 395, 5 RR 2d at 1909. To the extent that owner participation at a station moves away from day-to-day operation, the value of that participation necessarily diminishes. Accordingly, we are of the view that part-time participation must at least be on a weekly basis to receive credit. Finally, we agree with Network that its integration credit for MacInnis should not in effect be reduced by taking into account the limited partners' ownership interests. *SeeMerrimack Valley*Broadcasting, Inc., 92 FCC 2d 506, 510 n. 2, 52 RR 2d 1210, 1213-1214 n.2 (Rev. Bd. 1982), *reviewdenied,* FCC 83–465, released October 13, 1983; *Central Texas Broadcasting Co., Ltd.,* 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982), *reviewdenied,* FCC 83–

415, released September 21, 1983. Therefore, Network's full-time quantitative integration credit will be increased to 50.0%.[3]

12. *Minority*. Minority is a corporation made up of three stockholders: Colleen G. Watts, a 50% owner; Courtney E. Watts, a 45% owner; and Loretta A. Kingsbery, a 5% owner. I.D. para. 63. Mr. and Mrs. Watts propose to work full time at managerial positions but Mr. Watts claims only part-time credit since that was his intention as of the cut-off date. Originally, Mrs. Watts was a 5% owner and Mrs. Kingsbery a 50% owner but in a post-cut-off amendment Mrs. Kingsbery transferred 45% ownership to Mrs. Watts to create the current ownership arrangement and also resigned from her original integration role because she had married and was unable to relocate to Tahoe City due to her husband's business interests. *Id.* at n. 10. The ALJ disallowed any credit for Mrs. Watts' integration because of impermissible post-designation upgrading (*id.* at para. 107); he awarded Minority 45% part-time quantitative integration credit for Mr. Watts' proposal. Minority seeks to overturn the ALJ's ruling regarding Mrs. Watts, arguing in effect that the post-designation changes made here, which it claims were involuntary, merely effected a substitution of Mrs. Watts for Mrs. Kingsbery and should be permissible because the withdrawal and subsequent acquisition of stock were not commercially motivated. Minority maintains that to the extent Board precedents presume that resignations are voluntary they cannot stand because of their disparate impact on women in situations like this one.

13. The ALJ properly rejected Mrs. Watts' integration proposal as impermissible post-cut-off comparative upgrading. *SeeMidwest Broadcasting Co., supra*. Contrary to Minority's contention, the prohibition against comparative upgrading is not limited to ownership changes that are commercially motivated. Rather, it applies to any situation where the change resulted from a voluntary resignation of one of the principals of the applicant, whether for personal or business reasons. *See Golden State Broadcasting Corp.*, 54 RR 2d 348, 352 (Rev. Bd. 1983) ("[N]o case [is cited] where an applicant's decision to withdraw a principal because of divorce, legal separation or an inability to effectuate an integration proposal has ever been considered an 'involuntary' act."); *Birmingham Family TV, Inc.*, 91 FCC 2d 348, 52 RR 2d 525 (Rev. Bd. 1982); *Central Texas Broadcasting Co., Ltd., supra*; *New Continental Broadcasting Co., supra*. As we stated in *Central Texas Broadcasting Co., Ltd., supra*at 590, 51 RR 2d at 1483, "a post-designation resignation from an integration proposal is considered voluntary, and any substitution after resignation of a principal is viewed as a diminution of an applicant's integration

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[3] Under Section 3.1 of Network's limited partnership agreement, the two general partners are in full management control and have an "equal voice" in management. Hence, Network is entitled to 50% credit to reflect MacInnis' 50% voting power as one of Network's two general partners. See paragraph 8, *supra*.

proposal followed by an attempted prohibited upgrading." Minority's claim that the bar against upgrading in resignation cases has a disparate impact on women is not persuasive. In fact, the cases cited above where this situation has occurred have involved an equal number of men and women. True unfairness would be visited, however, on competing applicants if we were to allow post-cut-off comparative upgrading whenever resignations have occurred. Therefore, Minority is entitled to only 45% part-time credit.[4]

14. *North Shore.* At the time the applications were designated for hearing, North Shore was a general partnership consisting of three partners: Chris W. Kidd, David L. Metts, and Geneva H. Heavin. I.D., para. 82. Both Metts and Heavin proposed to work full time at the station. Subsequently, both withdrew from the applicant. The ALJ awarded no integration credit to North Shore. *Id.* North Shore argues initially that it is entitled to 51% quantitative integration credit for Chris Kidd since its application indicated that Kidd, who was then a 51% owner, would be integrated full time at the station "if the application is not granted until 1985, or if something unforeseen happens with his Placerville station." North Shore application, as amended December 19, 1980, Section IV-A para. 27. Moreover, North Shore seeks the remaining 49% integration credit since Kidd has now acquired Heavins' and Metts' interests in the applicant.

15. We concur with the ALJ that North Shore is not entitled to any integration credit. It is well established that an applicant for a broadcast facility cannot improve its comparative position at hearing by proffering evidence that is at variance with its application. *SeeCommercial Radio Institute, Inc.*, 78 FCC 2d 1016, 1025 n. 11, 47 RR 2d 1307, 1314 n. 11 (Rev. Bd. 1980). Here, North Shore indicated in its application as of the cut-off date that Kidd would not be integrated at the station and that he was evidently focusing on his interest at Placerville. That the application contained a contingency provision that Kidd might work if an "unforeseen" event occurred does not alter the fact that Kidd's intention as of the cut-off date was that he would not be working at the proposed station. North Shore cannot now change and improve its comparative proposal to the detriment of the competing applicants and seek credit for Kidd merely because subsequent events make it possible for him to work full time at the station. Acceptance of such a conditional and uncertain proposal would render the cut-off concept a nullity. Similarly, the post-cut-off acquisition of Heavins' and Metts' interests by Kidd does not entitle North Shore to any integration credit.

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[4] Minority cannot receive integration credit for Mrs. Watts' previous 5% ownership since Mrs. Watts did not propose to work at the station until after the cut-off date. We also reject Cascade's challenge in its reply brief to the credit awarded for Mr. Watts. This objection was waived by Cascade since it did not file exceptions. *See*Section 1.277(a), 47 CFR §1.277(a), and Section 1.279, 47 CFR §1.279.

See para. 13, *supra*. No integration credit will be awarded to North Shore.

16. *High Sierra*. High Sierra is a corporation comprised of three stockholders. The ALJ concluded that High Sierra was not entitled to any integration credit since none of its principals would work at least 20 hours per week at the proposed station. I.D., para. 103. No exceptions have been taken to this conclusion and it is therefore affirmed.

17. In sum, the integration credit awarded (including qualitative enhancements, which we have not detailed heretofore because there were no exceptions) is as follows: Cascade—100% full-time quantitative credit enhanced by 66–⅔% female ownership and proposed local residence; NTBC—60% full-time quantitative credit enhanced by residence in the service area and 20% female ownership; Network—50% full-time quantitative credit enhanced by residence in the service area; Minority—0% full-time and 45% part-time quantitative integration credit; High Sierra—0% quantitative integration credit; and North Shore—0% quantitative integration credit. Although Cascade, NTBC, and Network are qualitatively enhanced to varying degrees, the enhancement attributes are not decisionally significant here since qualitative attributes will not suffice to overcome a clear quantitative difference. *See WHW Enterprises, Inc., supra*; *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981). Cascade's 100% integration proposal clearly surpasses the other proposals and is entitled to a moderate integration preference over NTBC, *see WHW Enterprises, Inc., supra* (moderate preference given for 100% v. 66–⅔% advantage), and a substantial preference over the remaining applicants. *See Central Texas Broadcasting Co., Ltd., supra*.

18. *Diversification*. The ALJ found that neither Cascade, NTBC, Minority, Network nor their principals have any mass media interests, that High Sierra's principals own AM and FM facilities at Ventura, California, and that North Shore principal Chris Kidd owns a 30% interest in a construction permit for an FM station at Placerville, California. The ALJ awarded Cascade, NTBC, Minority and Network a slight preference over High Sierra and North Shore, and found the latter two equal under the diversification criterion. I.D., para. 101. The sole exception to these findings was filed by North Shore, which claims that the Placerville station should not be attributed to it since Kidd disposed of his interest in the station in September and October 1982. Despite Kidd's action, his former ownership interest in the Placerville station must continue to be attributed to North Shore. North Shore made no unequivocal predesignation commitment to divest that interest upon grant of its application, and recognition of the post-cut-off divestiture now would prejudice the other applicants. *Broadcast Communications, Inc.*,— FCC 2d—, 53 RR 2d 805 (Rev. Bd. 1983); *Muncie Broadcasting Corp.*,

89 FCC 2d 123, 51 RR 2d 46 (Rev. Bd. 1982), *review denied*, FCC 83-234, released May 19, 1983. We will affirm the ALJ's conclusions under this criterion.

19. *Auxiliary Power*. Both Cascade and Minority propose to install auxiliary power sources. The other applicants do not. Accordingly, Cascade and Minority are entitled to very slight preferences. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966).[5]

20. *Certification and Misrepresentation/Lack of Candor Issues*. In the *Hearing Designation Order*, *supra*, issues were specified to determine whether Cascade's application and subsequent amendment were properly certified and executed and whether it attempted to mislead the Commission or was lacking in candor regarding the preparation and execution of those documents. The issues were based on the following series of seemingly inconsistent filings and representations made by that applicant: a) a representation in Cascade's original application, filed July 31, 1980, that its partnership consisted of an oral agreement not yet reduced to writing; b) an unsigned amendment filed December 19, 1980, containing an unsigned and undated written partnership agreement; c) a signed copy of the December 19 amendment, filed January 16, 1981, consisting of the same written partnership agreement signed and bearing the date July 15, 1980; and d) a letter, dated January 22, 1981, from counsel indicating that the partnership agreement was executed earlier that month.

21. The ALJ concluded that the hearing record was devoid of any substantial evidence that Cascade's application or December 19 amendment thereto was improperly certified or that Cascade was lacking in candor in connection with those submissions. I.D., para. 91. Essentially, the ALJ made the following findings of fact which we adopt as a fair summation of the evidence and which, we believe, dispel any doubts regarding Cascade's conduct: (1) the Cascade principals entered into an oral partnership agreement on July 15, 1980; (2) Cascade filed an amendment to its application on December 19, 1980 to include a written copy of the partnership agreement, unsigned since the principals had been unable to meet prior to that date to sign the agreement; the amendment advised, however, that a supplement would be filed to include an executed copy of the agreement; the agreement was executed on January 2, 1981; (3) Cascade submitted an executed copy of the partnership agreement in a supplement filed January 16, 1981, bearing an effective date of July 15, 1980, to reflect that the written partnership agreement memorialized the oral agreement reached on July 15, not to represent that the written agreement was physically signed on that

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[5] Network challenged the preference awarded Cascade in its exceptions but withdrew its objection at oral argument. Tr. 2345.

date; the supplement also included a transmittal letter, signed by John W. Simpson on December 17, 1980, which he had intended to accompany the December 19 amendment but which was omitted because he did not return it to counsel in time for filing; and (4) Cascade filed a letter on January 22, 1981 to clarify that the executed copy of the partnership agreement was being filed as a supplement to the December 19 amendment and not as a separate amendment under cover of the December 17 transmittal letter that was included in the January 16 supplement. I.D., paras. 49-54, 91-92. The issues were resolved in favor of Cascade. *Id.* at para. 93.

22. NTBC excepts to the ALJ's resolution of this issue arguing that Cascade must be assessed a significant comparative demerit if not a disqualifying one. NTBC Br. at 11. We deny the exceptions. NTBC's most serious allegation is that Cascade attempted to mislead the Commission into believing that the partnership agreement filed December 19 had been agreed to by all three partners; the allegation is premised on the fact that not all of the partners had actually seen a copy of the written agreement before it was filed. This exception, however, is based on a *nonsequitur*. The record clearly reflects that Cascade principal John W. Simpson called his sisters upon receipt of a copy of the agreement and informed them of its content prior to filing. Cascade Exh. 8, p. 1; Tr. 211, 249. Therefore, we discern no significance in the fact that they did not actually see a copy of the agreement before an unexecuted copy was filed with the Commission. NTBC also claims that the written agreement contains provisions not discussed previously rendering false any claim that it is a mere reduction to writing of an earlier oral agreement. This claim is insufficient to undermine the ALJ's findings since NTBC fails to cite any record support for its assertion. NTBC further charges that Cascade's counsel inserted the July 15, 1980 date into the written agreement without explicit approval of any partner, thereby nullifying Simpson's certification of the January 16 supplement. The exception is without merit. The record citations (Tr. 252–253, 256) advanced by NTBC do not support its charge that the insertion was unauthorized. Rather, John W. Simpson testified that he instructed counsel to type in the effective date. Cascade Exh. 8, p. 3. And the fact that the insertion was subsequent to the certification is not significant since the insertion was authorized and there is no evidence of concealment or misrepresentation. *See Broadcast Communications, Inc., supra*, at 813. Finally, NTBC attacks the ALJ's findings because they are almost identical to Cascade's proposed findings. NTBC's challenge does not undermine the ALJ's findings, however, in the absence of a showing that those findings do not fairly and accurately reflect the record evidence. No such showing by NTBC was made here. We affirm the ALJ's resolution of these issues.

23. *Petitions to Enlarge Issues—Real-Party-In-Interest and Lack*

of Candor Issues. High Sierra and NTBC except to the ALJ's failure to add real-party-in-interest and lack of candor issues against Cascade requested by them along with Minority in a joint petition filed on April 2, 1982. Minority and Network also contend that a real-party-in-interest issue is warranted. Essentially, the requested real party issue was based on John A. Simpson's extensive financial involvement with the Cascade application. Simpson is a broadcaster and the parent of the Cascade principals. The requested candor issue was based on an allegation that Cascade attempted to cover up Simpson's true role and his control of the applicant's bank account. In this regard Cascade's opposition to the joint petition revealed that its application was incorrect insofar as it indicated that the applicant had a separate bank account, a representation which the younger Mr. Simpson had reaffirmed at hearing. The father, however, had neglected to open this account and was paying the bills from his own account. The ALJ denied the joint petition by Memorandum Opinion and Order, FCC 82M-1753, released June 7, 1982.

24. We conclude that the ALJ correctly refused to add the requested issues. The test for determining whether a third person is a real party-in-interest is whether that person has an ownership interest or is or will be in a position to actually or potentially control the operation of the station. *See KOWL, Inc.*, 49 FCC 2d 962, 964, 31 RR 2d 1589, 1592-1593 (Rev. Bd. 1974). Parties seeking such an issue where family members are involved, however, bear a heavy burden since the Commission recognizes that even independent family relationships may have attributes such as financial ties which in a non-family relationship would be persuasive indicia of real party status. *See KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605, 29 RR 2d 1578 (1974); *Cannon's Point Broadcasting Co.*, 53 RR 2d 953 (Rev. Bd. 1983). Here, as correctly noted in FCC 82M-1753, *supra*, Cascade disclosed from the outset the elder Simpson's financial role with the applicant. Simpson himself candidly explained that he agreed to provide financial support to Cascade because he wanted to assist his children in establishing their own business. *See* Simpson affidavit attached to Cascade's April 22, 1982 opposition to joint petition, Appendix C. As the ALJ concluded, the elder Simpson's role is essentially ministerial; he has paid all bills presented to him but did not incur Cascade expenses himself. *Id.* Moreover, Simpson has averred that he will not control or attempt to control the applicant, even in the event of a default by Cascade or his children, *id.*, and paragraph 12 of the Cascade partnership agreement itself forbids the father from ever acquiring any interest in the applicant. *KOWL, Inc.*, *supra*, and *WORZ, Inc.*, 22 FCC 1254 (1957), cited by exceptors as controlling, are inapposite. In *WORZ, Inc.*, the Commission determined that an individual (father and husband of purported principals) was a real party-in-interest where the evidence showed that the staff considered him to be an owner, he publicly held

himself out as an owner, and his wife-owner frequently delegated management authority to him. No comparable facts are present here. In *KOWL, Inc.*, a third person proposed to finance the applicant on very favorable terms. In adding the issue, the Board noted that the individual had a motive for exercising potential control in view of his son's admitted past and indicated future involvement with the applicant. The individual also would not make an affirmative statement that he would not control the applicant. Here, by contrast, both the partnership agreement and the elder Simpson's affidavit negate any indication that he will attempt to control the applicant. No real-party-in-interest issue has been justified.

25. Similarly, a *prima facie* case has not been established for addition of the requested lack of candor issue. The elder Simpson has provided a credible explanation for the misunderstanding concerning whether he had established a separate bank account for payment of Cascade's bills: he thought it unnecessary to open a separate account because he was already paying all Cascade expenses and feared that such an account would be confused with an account he already had called Cascade Investments; and he neglected to inform his son because he did not think "the mechanics of how I paid those bills were important." *See* Simpson affidavit, *supra*. Simpson's son corroborates the above, averring that he only learned on April 7, 1982 that a separate account had not been established; that such an account was opened on April 15, 1982; and that he is the sole signatory on that account. *See* John W. Simpson's affidavit attached to Cascade's April 22, 1982 opposition, Appendix D. While we do not condone the applicant's inattentiveness to its affairs in this regard, the circumstances described do not suggest an intent to deceive or otherwise provide a sufficient basis for a lack of candor issue. *See Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172, 1180, 49 RR 2d 1001, 1007 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (1981); *Radio Laredo, Inc.*, 87 FCC 2d 353, 361, 49 RR 2d 1489, 1495 (Rev. Bd. 1981), *aff'd per curiam sub nom. Amigos Broadcasting, Inc.* v. *FCC*, 696 F.2d 128 (D.C. Cir. 1982).

26. *Certification/Misrepresentation Issue Request.* NTBC excepts to the ALJ's failure to specify a certification/misrepresentation issue against Cascade. NTBC asserted that while John W. Simpson testified that he had Cascade's complete application for approximately three days before signing it on July 30, 1980, the application contains a letter from the Harris Corporation dated July 28, 1980; therefore, NTBC claimed that Simpson's certification was improper because the Harris letter could not have been included in the application when Simpson signed it. NTBC also alleged that Simpson testified falsely when he said he had the entire application for three or four days before signing it. By Memorandum Opinion and Order, FCC 82M-1834, released June 10, 1982, the ALJ denied the request.

27. The ALJ correctly denied NTBC's petition. In its opposition, Cascade explained that the Harris letter was delivered to counsel on July 28, 1980, prior to its sending the complete application to Simpson for review, and that Simpson may have received the application as late as the morning of July 30, 1980, the day he signed it. While it appears that Simpson may have testified incorrectly concerning the number of days he had the application prior to signing, this discrepancy is not portentous or even surprising since he was recalling events that had occurred approximately 19 months before. In any event, Simpson testified without contradiction that he received the Harris letter before he certified the application. Tr. 208. That is enough; the rest is non-decisional trivia.

28. *Site Location Issue Request.* High Sierra contends that the ALJ erred in denying its request (FCC 81M-4131, released December 31, 1981) for an issue to ascertain the *bona fides* of Cascade's intent to serve Tahoe City, California. We disagree. High Sierra's petition simply requested an issue without stating any basis for it. As such, the ALJ was completely correct in denying the request for failure to comply with Section 1.229(d) of the Commission's Rules. In any event, the Commission's Report and Order in *Suburban Community Policy*, 53 RR 2d 681, 697 (1981), forecloses hearing consideration of the type of issue apparently contemplated by High Sierra. Hence, its request is now moot.

29. *Site Availability Issue Request.* High Sierra also excepts to the ALJ's failure to add site availability issues against Minority, North Tahoe, and Network based on a petition filed by Cascade on May 10, 1982 and denied by Memorandum Opinion and Order, FCC 82M-2065, released July 6, 1982. In light of our conclusion, para. 30, *infra*, that none of these applicants is the comparative winner, we need not and will not reach the merits of this exception.

30. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. We have awarded Cascade a substantial integration preference over Minority, Network, High Sierra and North Shore, a moderate integration preference over NTBC, and a very slight auxiliary power preference. Minority also was awarded a very slight auxiliary power preference. Cascade, NTBC, Minority, and Network have also received a slight diversification preference over High Sierra and North Shore. When these preferences are weighed the comparative balance clearly tips in Cascade's favor because of its superior integration proposal and the fact that it is the only applicant to have also earned diversification and auxiliary power preferences. Thus we affirm the ALJ's ultimate conclusion that a grant of Cascade's application will best serve the public interest, convenience, and necessity.

31. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed July 25 and October 13, 1983, by North Shore

Broadcasters and Cascade Communications Company, respectively, ARE GRANTED, and the amendments ARE ACCEPTED; and

32. IT IS FURTHER ORDERED, That the application of Cascade Communications Company (File No. BPH-800731AC) for a construction permit to establish a new FM broadcast station at Tahoe City, California IS GRANTED, the applications of High Sierra Broadcasting, Inc. (File No. BPH-800118AJ), Minority Broadcasting of Tahoe, Inc. (File No. BPH-800829AI), North Tahoe Broadcasting Company (File No. BPH-800829AM), The Women's Network (File No. BPH-800829AW), and North Shore Broadcasters (File No. BPH-800829BE) ARE DENIED, and the application of Tahoe City Wireless, Limited (File No. BPH-800829AD) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 83D-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HIGH SIERRA BROADCASTING, INC. Tahoe City, California	BC Docket No. 81–637 File No. BPH-800118AJ
John M. Simpson, Mary Carmen Simpson and Laura E. Simpson, d/b/a CASCADE COMMUNICATIONS COMPANY Tahoe City, California	BC Docket No. 81–638 File No. BPH-800731AC
TAHOE CITY WIRELESS, LIMITED Tahoe City, California	BC Docket No. 81–639 File No. BPH-800829AD
MINORITY BROADCASTERS OF TAHOE, INC. Tahoe City, California	BC Docket No. 81–640 File No. BPH-800829AI
R. D. Russell, L. R. Grady, J. A. Schmitt, N. W. Hughes and B. S. Hughes, d/b/a NORTH TAHOE BROADCASTING COMPANY Tahoe City, California	BC Docket No. 81–641 File No. BPH-800829AM
Donna L. Heinle, John S. MacInnis, Sadako Okino Decollo, Virginia Hsieh Le Roux, Dorothy Standing Bear Pellerin and Frances Strychaz, d/b/a THE WOMEN'S NETWORK, A Limited Partnership Tahoe City, California	BC Docket No. 81–642 File No. BPH-800829AW
Chris W. Kidd, David L. Metts and Geneva H. Heavin, d/b/a	

NORTH SHORE BROADCASTERS Tahoe City, California For Construction Permit for a New FM Station	BC Docket No. 81–643 File No. BPH-800829BE

Appearances

A. Harry Becker on behalf of High Sierra Broadcasting, Inc.; *Thomas L. Siebert* and *Mary C. Albert* on behalf of Cascade Communications Company; *Robert C. Burns* and *Richard A. Helmick* on behalf of Tahoe City Wireless, Limited; *William H. Fitz* and *Lawrence E. Carr III* on behalf of Minority Broadcasters of Tahoe, Inc.; *Lee W. Shubert* and *Jerrold D. Miller* on behalf of North Tahoe Broadcasting Company; *John S. MacInnis* on behalf of The Women's Network; *Chris W. Kidd* on behalf of North Shore Broadcasters; and *Joseph A. Belisle* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

(Issued: May 26, 1983; Released: June 8, 1983)

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of High Sierra Broadcasting, Inc. (High Sierra), John M. Simpson, Mary Carmen Simpson and Laura E. Simpson, d/b/a Cascade Communications Company (Cascade), Tahoe City Wireless, Limited (TCWL), Minority Broadcasters of Tahoe, Inc. (Minority), R. D. Russell, L. R. Grady, J. A. Schmitt, N. W. Hughes and B. S. Hughes, d/b/a North Tahoe Broadcasting Company (NTBC), Donna L. Heinle, John S. MacInnis, Sadako Okino Decollo, Virginia Hsieh Le Roux, Dorothy Standing Bear Pellerin and Frances Strychaz, d/b/a The Women's Network (Network), and Chris W. Kidd, David L. Metts and Geneva H. Heavin, d/b/a North Shore Broadcasters (North Shore), for authority to construct and operate a new FM broadcast station on Channel 243 at Tahoe City, California. The *Hearing Designation Order*, 46 F.R. 47488, September 28, 1981, specified the following issues:

> 1. To determine with respect to Cascade:
>
> (a) whether the original application and January 16, 1981 amendment to the application were properly certified and executed by a principal as required by law; and
>
> (b) whether Cascade attempted to mislead the Commission or was lacking in candor with respect to preparation and execution of its application and the

January 16, 1981 amendment thereto, and the certifications contained therein; and

(c) whether, in light of the evidence adduced pursuant to (a) and (b) above, Cascade should be disqualified or a comparative demerit assessed.

2. To determine with respect to TCWL:

(a) the source and availability of funds to meet the costs of construction and operation for three months; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.[1]

3. To determine with respect to Minority:

(a) the source and availability of additional funds over and above the $455 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.[2]

4. To determine with respect to NTBC:

(a) the source and availability of additional funds over and above the $86,440 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.[3]

5. To determine with respect to Network:

(a) the source and availability of additional funds over and above the $33,000 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

6. To determine with respect to North Shore:

(a) the source and availability of funds to meet the costs of construction and operation for three months; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

7. To determine which of the proposals would, on a comparative basis, better serve the public interest.

8. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Memorandum Opinion and Order* FCC 82M-0043, released January 8, 1982, the issues were enlarged to include the following:

To determine with respect to High Sierra:

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[1] By *Memorandum Opinion and Order* FCC 81M-3659, released November 17, 1981, the financial issue against TCWL was resolved in its favor.

[2] By *Memorandum Opinion and Order* FCC 82M-0111, released January 12, 1982, the financial issue against Minority was resolved in its favor.

[3] By *Memorandum Opinion and Order* FCC 81M-4121, released December 30, 1981, the financial issue against NTBC was resolved in its favor.

(a) the source and availability of funds to meet the costs of construction and operation for three months; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

3. By *Memorandum Opinion and Order* FCC 82M-0112, released January 12, 1982, the issues against TCWL were enlarged, to wit:

> To determine whether TCWL has complied with the provisions of Section 73.3514 of the Commission's Rules by providing all the information required by the Commission's application and, if not, the effect of such noncompliance on its basic and/or comparative qualifications to be a Commission licensee.

4. By *Memorandum Opinion and Order* FCC 82M-0123, released January 18, 1982, the following issue was specified against High Sierra, TCWL, Minority, NTBC and Network:

(a) To determine whether the engineering proposals of High Sierra, TCWL, Minority, NTBC and Network comply with Section 73.315(b) of the Commission's Rules with respect to path obstruction and line-of-sight requirements between the transmitter site and the principal city to be served;

(b) in light of the evidence adduced pursuant to (a) above, the effect upon the basic and/or comparative qualifications of these applicants to be a Commission licensee.[4]

5. By *Memorandum Opinion and Order* FCC 82M-0522, released February 18, 1982, the following issue was specified with respect to High Sierra:

(a) whether Robert L. Fox of High Sierra used the threat of publicizing information about Dr. Stanley Soho's medical license revocation proceedings in an effort to induce Dr. Soho's withdrawal of financial backing for Ms. Mary Alice Renteria's application for the Tahoe City FM facility;

(b) whether Mr. Fox's conduct constituted an attempt to harass, coerce and intimidate Dr. Soho; and

(c) the effect of the evidence adduced pursuant to (a) and (b) above upon the basic and/or comparative qualifications of High Sierra to be a Commission licensee.

6. A prehearing conference was held November 13, 1981, and further conferences were held May 17 and July 20, 1982. The hearing sessions were held in Washington, D.C. on February 23–26, 1982, March 1 and March 22, 1982, June 9–11 and June 14–16, 1982. The record was closed July 20, 1982 pursuant to *Order* FCC 82M-2237, released July 21, 1982. By *Order* FCC 82M-2255, released July 23, 1982, the record was reopened to receive Cascade Exhibit 13 and was reclosed; and by *Order* FCC 82M-3280, released October 21, 1982, the record was reopened to receive TCWL Exhibit 1A and was again

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[4] By *Memorandum Opinion and Order* FCC 82M-0578, released February 23, 1982, the site suitability issue specified against High Sierra, TCWL, Minority, NTBC and Network was resolved in the applicants' favor.

closed. Proposed findings of fact and conclusions of law were filed by the applicants on November 29, 1982,[5] and reply findings were filed December 14, 1982 by North Shore and December 15, 1982 by High Sierra, Cascade, Minority and NTBC.

Findings of Fact

High Sierra Broadcasting, Inc.

The Applicant

7. High Sierra is a corporation organized under the laws of the State of California for the purpose of owning and operating an FM radio station in Tahoe City, California. The officers and directors of High Sierra are Robert L. Fox, president and chief financial officer; Ira E. Laufer, vice president and secretary; and David A. Loe, vice president. Tr. 121, 131. Each principal owns 33-⅓% of the outstanding shares of High Sierra. Tr. 121. Messrs. Fox, Laufer and Loe also own the outstanding shares of KVEN Broadcasting Corp., licensee of KVEN-KHAY(FM), Ventura, California. High Sierra Exs. 1, 4 and 7.

8. Robert L. Fox was born in 1928 in Cincinnati, Ohio, and moved to Los Angeles, California in 1935. In June 1950, he graduated from the University of California at Berkeley with a B.A. in psychology. He is married and has two daughters. High Sierra Ex. 7, p. 1.

9. Mr. Fox has been employed for most of his working life in the field of communications. From 1965 to the present, he has been president, general manager and a 47.04% stockholder of KVEN Broadcasting Corp. High Sierra Ex. 7, p. 1.

10. Mr. Fox's civic and professional accomplishments in the broadcasting field include the following:

(a) 1974-Present. Founder, director and officer of the National Leukemia Broadcast Council, an organization which raises money for leukemia research through radio and television events;

(b) 1976–80. President and director of the Advertising Industry Emergency Fund, a group which raises and allocates funds to needy persons in the advertising industry.

(c) 1978-Present. Director and vice chairman of the Southern California Broadcasters Association.

(d) 1980-Present. Director and membership chairman of the California Broadcasters Association.

(e) 1980-Present. Member of the Radio Committee of the Broadcast Rating Council.

(f) 1979, 1980 and 1981. Guest lecturer at UCLA.

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[5] NTBC has moved to dismiss North Shore's proposed findings on the grounds that they do not provide adequate citations to the record. Ordinarily proposed findings without reference to the record are useless. Here, however, in light of the multitude of proposed findings filed, North Shore's omission can be overlooked.

(g) Present. Member of the Pacific Broadcast Pioneers.

(h) Present. Member of the Hollywood Radio and Television Society. High Sierra Ex. 7, p. 2.

11. Ira E. Laufer was born in 1927 in Newark, New Jersey, and has lived and worked in California almost continuously since 1947. He is married and has three children. High Sierra Ex. 4, p. 1.

12. Mr. Laufer attended the University of Southern California for four years and has worked for various organizations in the fields of broadcasting and communications since 1950. Since 1965 Mr. Laufer has been vice president, secretary and a 42.86% shareholder of KVEN Broadcasting Corp. Tr. 88; High Sierra Ex. 4, p. 1.

13. Mr. Laufer's broadcast-related awards and accomplishments include the following:

(a) 1973–74. Chairman, Southern California Broadcasters Association. 1966–67, Director of organization.

(b) 1973. Board of Directors, National Broadcast Editorial Association.

(c) 1970. Lecturer, Radio Advertising Bureau Conference.

(d) 1972–81. Awarded eight Golden Mikes from Southern California Radio-TV News Association for editorials or news analysis.

(e) 1980. Winner of Best Radio Editorial, California Associated Press Radio Awards.

(f) 1972–73. Member, Advisory Council to School of Radio Communications, University of Southern California. High Sierra Ex. 4, p. 2.

Mr. Laufer's civic interests and affiliations include:

(a) 1974–77. Deputy Mayor and Member of City Council, City of Ventura.

(b) 1972–76. Member of California Coastal Zone Conservation Commission.

(c) 1969. President, Greater Ventura Chamber of Commerce.

(d) 1973–74. Board Member, South Coast Transit District.

(e) 1976–77. Member, City of Ventura Water Committee.

(f) 1970. Outstanding Citizen of the Year, City of Ventura.

(g) 1966–67. Board of Directors, Ventura County Economic Development Association.

(h) 1973–74. Board of Directors, Ventura County Association of Governments.

(i) Board of Directors, Ventura County Heart Association, Big Brothers-Big Sisters, Salvation Army, Ventura Rotary Club, Ventura County Historical Society, National Alliance of Businessmen, Ventura County Older Workers Advisory Board. High Sierra Ex. 4, p. 2.

14. David A. Loe was born in 1945 in St. Paul, Minnesota, and moved to Saratoga, California in 1955. He graduated from the University of California at Santa Barbara with a B.A. in economics

in December 1967. He is married and has two children. High Sierra Ex. 1, p. 1.

15. From 1969 to 1971, Mr. Loe was an announcer, program director and salesman at KNEZ Radio, Lompoc, California. From 1971 to 1974, he was a salesman with KACY Radio, Oxnard, California. From 1974 to the present, he has been local sales manager and is currently vice president for sales, assistant station manager and a 10% stockholder of KVEN Broadcasting Corp. High Sierra Ex. 1, p. 1. In his current position, Mr. Loe supervises a staff of five people. He spends approximately 50% of his time on sales efforts, 20% of his time on programming decisions and the remainder on personnel matters. Tr. 53–54.

16. Mr. Loe is a past president, officer and active member (from 1976 to the present) of the Advertising Club of Ventura County. He has also been a guest lecturer at Oxnard College and Ventura College during 1979, 1980 and 1981. High Sierra Ex. 1, p. 1.

17. Mr. Fox will be involved in the operation and management of the Tahoe City station. He intends to reduce his current full-time role at KVEN and KHAY to be present at the Tahoe City station for a minimum of two days per week. Tr. 126–28.

18. Mr. Laufer will also be a part of the management of the proposed station. His duties will include supervision of programming, community affairs, editorials and sales. Tr. 94. He will be present at least two days each week to manage the Tahoe City station. Tr. 98.

19. Initially Messrs. Fox and Laufer will be present jointly at the Tahoe City station. Later they will stagger visits to insure the continuing presence of the station's owners. Tr. 127.

20. Mr. Loe proposes to regularly spend time at the Tahoe City station in order to supervise the proposals outlined in the High Sierra application and will be particularly involved with supervision of sales. Tr. 53–54. He will also monitor, through tapes, the station's programming (Tr. 69) and will devote as much time as necessary to discharging these responsibilities. Tr. 73.

Financial Issue against High Sierra

21. By letter dated January 18, 1982, American Commercial Bank of Ventura, California extended a commitment to lend High Sierra $200,000 at rates prevailing at the time of the loan, with interest only the first year, payable at six-month intervals. High Sierra Ex. 10. By letter dated February 11, 1982, American Commercial Bank indicated that the personal guarantees of Mr. and Mrs. Fox and Mr. and Mrs. Laufer would constitute acceptable collateral for the foregoing loan. Tr. 116; High Sierra Ex. 11. The Foxes and the Laufers have executed affidavits expressing their willingness to grant such guarantees. High Sierra Exs. 5, 6-a, 8 and 9-a.

22. Each of the High Sierra principals has executed a separate affidavit committing himself to advance any necessary personal funds to construct and operate the proposed station. High Sierra Exs. 2, 5 and 8. Mr. Loe has a net worth exceeding $300,000 and quick assets exceeding $45,000 (High Sierra Ex. 2); Mr. Laufer has a net worth exceeding $3 million and quick assets exceeding $400,000 (High Sierra Ex. 5); and Mr. Fox has a net worth exceeding $1.8 million and quick assets of $25,000. High Sierra Ex. 8.

Abuse of Process Issue against High Sierra

23. The events leading to the specified charge began in the fall of 1979 when Ms. Mary Alic Renteria (Renteria) decided to apply for the Tahoe City FM allocation. Tr 992–93, 1019. She intended to finance the construction with an SBA loan. Tr. 992, 1022–23. She consulted her uncle, Dr. Stanley Soho (Soho),[6] who was familiar with the broadcasting field. Tr. 1028, 1035. It was decided that an SBA loan to Renteria would not be forthcoming (Tr. 1091), and so Soho offered to provide whatever funds would be necessary for her to prosecute the application and to construct and operate the station. Tr. 996, 1055, 1143. Both collaborated in the preparation of the application. Tr. 993, 1001–09, 1012–17, 1092–93, 1141–43, 1148–51, 1164–65. Soho became aware of the Mt. Pluto site after seeing it proposed in the High Sierra application and learned through the Truckee Ranger District that Motorola controlled the site. He contacted Motorola to inquire as to its availability. Tr. 1165–66, 1463, 1492, 1501.

24. In contacting Motorola, Soho talked a number of times with William Goshay (Goshay), an antenna site project manager (Tr. 1166, 1558, 1567, 1568), about obtaining a site availability statement for Mt. Pluto. Tr. 1170, 1559, 1560, 1572. Goshay advised that Motorola had entered into an exclusive lease arrangement with High Sierra for the site and that he could not give a site availability statement to anyone else. Tr. 1168, 1559–60, 1565, 1573. Soho countered that, because of the strength of other applicants, it was unlikely that High Sierra would be the one that would win a grant (Tr. 1566, 1574–75) and that Motorola's exclusive lease arrangement with High Sierra was in violation of an FCC regulation, and he asked for a copy of the lease. Tr. 1170, 1569, 1573–78, 1613.

25. In turn, Goshay called Robert Fox (Fox) of High Sierra and told him of Soho's requests. Tr. 1566, 1568–69. It only was subsequent to this conversation with Fox that Goshay sent Fox the lease agreement for the Mt. Pluto site for execution. Tr. 1601. When

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[6] Soho lives in Los Angeles, California. Tr. 1131. He and his wife own Soho Broadcasting, which is the licensee of KBAN, South St. Paul, Minnesota, and KRWT, Winters, Texas. Tr. 1237–38. It is also the permittee of KBWA, Williams, Arizona. Tr. 1237.

Goshay called Fox to report his telephone conversations with Soho, he gave him Soho's phone number. Tr. 1564, 1583.

26. According to Fox, Soho first contacted him prior to Goshay's call and demanded of him a copy of High Sierra's Tahoe City application. Tr. 2162–63. At this conversation, he learned from Soho that he was a medical doctor and that minorities were interested in the Tahoe City allocation. Tr. 2163.[7] Following this first conversation, Fox attempted to look up Soho in a telephone directory, without success, and assumed that the call from Soho was a hoax. Tr. 2165. Fox in fact doubted Soho's existence even after Goshay's call (Tr. 2201) and inquired of Soho at the Los Angeles Medical Association. Tr. 2170. That also was not fruitful, but after checking with the California Medical Quality Assurance Board, at the suggestion of the Medical Association, Fox learned of a pending license revocation against a Dr. Stanley Soho. Tr. 2171–72. Fox then called the number Goshay gave him (Tr. 2173–74) to confirm that it was Soho's number.[8] According to Fox, he learned from his communications lawyer that there was no pending application in the name of Stanley Soho. Tr. 2179. Fox then called Soho again because he was concerned that Soho was improperly proceeding as an applicant because of inexperience (Tr. 2180) and he felt that Soho had erroneous misgivings about High Sierra's engineering proposal. He was further concerned that Motorola might cancel its lease with High Sierra because of Soho's erroneous and misguided remarks. Tr. 2215–16. Fox stated that he was not concerned about the threat Soho posed to the alleged exclusive arrangement. Tr. 2216. Fox recalls telling Soho about the difficulty he had finding a listing for him and that he could only verify that Soho actually existed by checking with the California Board. According to Fox, Soho responded that he was taking due note of the threatening remark. Tr. 2181–82. High Sierra principal Ira Laufer shares an office with Fox and was present when Fox talked with Soho and recalls that no threat was made by Fox. Tr. 2130.[9]

27. Soho's recollections of the April 2, 1980 telephone call differ from that of Fox. Soho's testimony is that Fox calmly threatened that unless Renteria's application were withdrawn, he would disse-

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[7] Soho's recollection of the first call is that he identified himself to Fox as the backer of an application by Renteria for the Tahoe City FM station (Tr. 1180); that Fox identified himself as Motorola's lessee at Mt. Pluto (Tr. 1177); that Fox inquired into the purpose of his calls with Motorola; and that Fox then said that he did not believe women or Mexicans should own radio stations. Tr. 1177–78.

[8] Soho alleges a longer intermediate call covering the topics of the Mt. Pluto site and lease, Renteria and her proposed application and High Sierra's rule making proceeding. Tr. 1622–23, 1631, 1633, 1644–46. Fox's telephone bills confirm that a call of one minute or less was made to Soho's office telephone. High Sierra Ex. 23.

[9] Telephone records reflect that this call was made on April 2, 1980. High Sierra Ex. 30.

minate information about Soho's medical license revocation throughout the Los Angeles area (Tr. 1666); that Fox said he had well-placed contacts in the broadcast and print media that could be easily enlisted in such a scheme (Tr. 1667–68); and that Fox threatened to contact each and every nursing home that employed Soho and make the information known. Tr. 1672.

28. According to Soho, he thought the matter over and decided he could do without such trouble. He informed Renteria sometime in late April 1980 that he would no longer help her in the preparation of her application or provide her with the financing necessary to support her application. Thereafter, Renteria ceased all activities relating to the preparation of her application. Tr. 997, 1048, 1050, 1055, 1111, 1183. Her application was only partially completed at that time. Tr. 1082; Bureau Ex. 5. Renteria alleges that sometime after Soho informed her of his withdrawal of financial support, she inquired as to the identity of Fox and was told by Soho that Fox was with High Sierra, an applicant for the Tahoe City station. Tr. 1096. Renteria recalls that she spoke with Soho on a number of occasions concerning the blackmail attempt. As a result of these conversations, she decided in October or November of 1981 to bring the matter to the attention of the FCC. Renteria drafted an affidavit which Soho helped finalize. Basically, the affidavit stated that Renteria had been in the process of preparing an application for the Tahoe City allocation which was to be financed by Soho and that in April 1980 Soho contacted her and told her that he could not continue to support her efforts financially due to the fact that Fox had threatened him with blackmail. Soho sent Renteria's affidavit and his own to Cascade's counsel in December 1981 for filing with the FCC. Tr. 1043–47, 1068, 1097–99, 1102–04, 1119–20, 1190–91.

29. Soho has no first-hand knowledge that Fox personally carried out his threat of publicizing the unpleasant events surrounding his medical license revocation proceeding. However, he alleges that on May 25, 1981, KNXT-TV in Los Angeles did broadcast a program on the 5:00 p.m. and 11:00 p.m. local news show concerning Soho's medical license revocation proceeding. Tr. 1184, 2231. Approximately a week earlier, Soho had been notified by KNXT that a program relating to him and his medical license revocation would be broadcast. Tr. 1185–88, 1926–27. At the time the show was aired by KNXT, the revocation of Soho's medical license was a matter of public record. Tr. 1188.

30. Following the filing of the affidavits, High Sierra attempted to secure KNXT-TV's admission that Fox was not the source of the "expose" on Soho. Tr. 2192. He was unsuccessful because it is the policy of CBS to reveal no information of any type about story sources. Tr. 2193. An attorney for the station also advised Fox that the station has no records of a program such as the one Soho describes as the expose about him in the general time frame of May

25, 1981. Tr. 2194. Soho alleges that he made a video tape of the expose and contemplated suing CBS (Tr. 1383–84, 1718–19), but failed to do so because he was afraid of facing their defense lawyers. Tr. 1382. Soho testified that he erased the video tape and destroyed the written notes on the expose just prior to the hearing herein. Tr. 1384.

31. At hearing Fox outlined his record of promoting female and minority participation in broadcasting (Tr. 2187–91) and his commitment to equal opportunity generally. Fox employed women at his station long before it was fashionable to do so and now has a greater percentage of women working for him than are available in the work force at large. Tr. 2187. Three of five of his sales staff are women, including the sales manager. Tr. 2135, 2187. One of his staff, Leticia Rodriguez, a female Hispanic, is now being trained to work in national sales. Tr. 2187. The station also employs a second female Hispanic, Esperanzo Ortega, as a member of the office staff. Tr. 2134. In addition, Fox has been a member of the National Organization for Women since 1979. Tr. 2188, 2210. Fox has also helped place a number of women in broadcasting (Tr. 2188–91; High Sierra Exs. 31 and 32) and participated in a career seminar for women and minorities in broadcasting at the Exposition Park Museum adjacent to the University of Southern California. Tr. 2188.

32. On May 22, 1979, the California Board instituted proceedings to suspend or revoke Soho's license to practice medicine in California. Bureau Ex. 3. A hearing on the California complaint was scheduled for mid-1980 (Tr. 1386), but in August 1980 Soho stipulated to the truth of the substantive allegations against him (Bureau Ex. 3, p. 3) and agreed to a revocation of his license to practice medicine. Bureau Ex. 3, pp. 4–7. The revocation was to be stayed, however, and Soho would have been placed on a conditional five-year probation if certain conditions were satisfied. The conditions included the following: (a) passing an oral clinical examination in general medicine; (b) a program of continuing medical education during each year of probation; (c) compliance with the laws of the United States and the State of California relating to the practice of medicine; (d) cooperation with representatives of the Board in monitoring the terms of his probation; and (e) personal appearance for interviews upon request by the Board's medical consultants. Bureau Ex. 3, pp. 4–6. Although Soho was unhappy about the stipulation, he viewed it as a "good deal." Tr. 1391. In retrospect, however, he believes he was "had" because of the subjective nature of the tests. Tr. 1393.

33. Soho was also licensed to practice medicine in Arizona. Tr. 1194. On April 29, 1981, the State of Arizona's Board of Medical Examiners summoned Soho for a hearing to be held in the summer of 1981 to determine whether his license in that state should be revoked. Tr. 1394. Believing himself unvindicated in California, Soho "insisted" on litigating all the charges on the merits. Tr. 1393–96. At

the conclusion of the Arizona proceeding, Soho claims that he was absolved of the charges against him. Tr. 1856. Despite his asserted vindication, however, Soho's Arizona license was lifted automatically because of his revocation in California. Tr. 2089. Nevertheless, Soho concluded that he was found not guilty by the Arizona Board (Tr. 1396–97) and reported to the Commission in amendments to his pending applications that Arizona "did not find him guilty." High Sierra Ex. 25, pp. 30–31.

Cascade Communications Company

The Applicant

34. Cascade is a general partnership formed for the purpose of applying for a construction permit and operating an FM radio station in Tahoe City, California. The general partners of Cascade are John W. Simpson, Mary Carmen Simpson and Laura E. Simpson, each owning 33–⅓%. The three general partners are siblings. Cascade Ex. 1.

35. Neither Cascade nor any of its partners holds any ownership interest in broadcast properties or other media of mass communications. Cascade Ex. 2.

36. John W. Simpson, a general partner and 33–⅓% owner of Cascade, will devote full time (minimum of 40 hours per week) as general manager of the proposed station. Cascade Ex. 3. His duties as general manager will include overseeing construction of the station, hiring and firing of staff, serving as a liaison with the sales staff and acting as general overseer of station operations. He will be responsible for making policy decisions, although he will consult with his sisters and counsel in making those decisions. Tr. 408. Mr. Simpson will oversee construction of the Tahoe City station and transmitter site. This will involve hiring staff and subcontractors and overseeing their work. He will use his construction experience in the construction of the radio station and the power site. Tr. 451. Mr. Simpson's current occupation, that of construction supervisor for various construction projects, has led him to supervise a number of employees, both of his own company and of various subcontractors. Tr. 437.

37. Mary Carmen Simpson, a general partner and 33–⅓% owner of Cascade, will devote full time (minimum of 40 hours per week) as program director of the proposed station. Cascade Ex. 3. Ms. Simpson testified that one of her duties as program director would be the hiring of on-air staff, such as disc jockeys. In carrying out this duty, she would consult the other partners. Tr. 475. She further stated that she would likely be involved in the selling of advertising at the station and anticipated that she would develop a working knowledge in this area. Tr. 478. In her role as program director, she stated that she hoped to develop a regularly scheduled program of her own at

the station. Tr. 473. She also stated that the station intends to employ live talent more than 50% of the time. Tr. 480.

38. Laura E. Simpson, a general partner and 33–⅓% owner of Cascade, will devote full time (minimum of 40 hours per week) as director of news of the proposed station. Cascade Ex. 3. Ms. Simpson stated that her role as news director would include coordinating activities and becoming involved in community affairs. She further stated that, in addition to her job as news director, she would be willing to lend a hand in other departments if her help was needed and she also proposed to work as an announcer at the station. Tr. 510–11.

39. Each of the Cascade partners has spent considerable amounts of time in the Lake Tahoe area over the past few years, primarily at their family's vacation home at Cascade Lake, California, geographically adjacent to Lake Tahoe. Tr. 435–36. Each of the partners intends to move to the Tahoe City area and assume permanent residence if Cascade is granted a construction permit. Tr. 456, 480; Cascade Ex. 3.

40. Mr. Simpson attended Menlo College in Menlo Park, California. There he participated in the organization of equipment and programming of an on-campus radio station. When he first arrived at Menlo College, the college did not have a campus radio station. He stated that there were ensuing discussions among different students concerning the idea of organizing an on-campus radio station. He participated in the organization of that station by finding space in the school for the studios and by consulting on equipment purchases. The station was a carrier current station which could be received only in the dormitories at that time. Mr. Simpson also worked at the station as a disc jockey a couple of times per week for two hours each time. He was on the air as a disc jockey for approximately one-quarter of the school year while he was a full-time student. Tr. 399–401; Cascade Ex. 4.

41. During the period 1973–75, Mr. Simpson attended Napa College, Napa, California, and Pierce College, Woodland Hills, California, where he studied viticulture and horticulture. During 1975–78, he studied horticulture at California State Polytechnic University in Pomona, California. In 1978–79, Mr. Simpson was superintendent for commercial construction at the Mac-Jac Company in Los Angeles. From 1979-present, he has worked as construction supervisor for EMJAY Company, Culver City, California. In these capacities, he has supervised the construction of a number of commercial real estate properties in the Los Angeles metropolitan area. Cascade Ex. 4. During this period, Mr. Simpson also completed extension courses at the University of California at Los Angeles entitled "Basics of Radio Program Management" and "Managing and Operating a Modern Radio Station." He also completed an additional UCLA course, "Radio Broadcast Sales and Management,"

taught by a member of the Southern California Broadcasters Association. Tr. 425–27; Cascade Ex. 4.

42. Mary Carmen Simpson attended and graduated from Marymount High School in Westwood, California. Upon high school graduation, she enrolled from 1973–74 in the Center for Early Education in Los Angeles, where she was trained to teach preschoolers and received a one-year certificate for student teaching. From 1974 to 1977, she attended the University of Colorado at Boulder, Colorado, majoring in pre-nursing recreational therapy. Ms. Simpson's right leg was amputated below the knee in 1969 due to osteosarcoma. Cascade Ex. 5.

43. From 1977 to 1978, Ms. Simpson worked as a nurse's aide at the Santa Monica Medical Center in Santa Monica, California. Thereafter, she entered Mount St. Mary's College in Los Angeles in 1978; in June 1980 she graduated from Mount St. Mary's College with an A.A. in nursing. Upon her graduation and certification as a registered nurse, she assumed employment in this capacity at St. Joseph's Hospital in Burbank, California from July 1980 to October 1981. Cascade Ex. 5.

44. Ms. Simpson has participated in a variety of civic affairs and other local activities in the Tahoe City area. In the winters of 1971–73, she was a ski instructor for Vietnam veteran amputees at the Donner Ski Ranch; in the summer of 1973 she taught swimming to children between the ages of 5 and 15 at Tahoe Keys Camp; and in the summers of 1974 to 1977 she was a nurse's aide at the Barton Memorial Hospital in South Lake Tahoe. Tr. 469; Cascade Ex. 5.

45. In 1981 Ms. Simpson completed an extension course at the University of California at Los Angeles entitled "Radio Broadcast Sales and Management," which was taught by a member of the Southern California Broadcasters Association. Cascade Ex. 5.

46. Laura E. Simpson attended and graduated from Marymount High School in Westwood, California. Upon graduation from high school, from 1975 to 1979, she attended Chico State University at Chico, California, majoring in communications. During this period, she was involved in on-campus TV productions and took courses in still photography and communications psychology. Cascade Ex. 6.

47. From 1979 to present, Ms. Simpson has been a student at the Brooks Institute in Santa Barbara, California, where she is an illustration major. In 1980 she was on the dean's list at Brooks Institute and in 1981 she received a scholarship for achievement in her major. Ms. Simpson received her degree in April 1982. As part of her curriculum at Brooks Institute, she served an internship in the Department of Photography for *Sunset Magazine* in Menlo Park, California from October to November 1981. Cascade Ex. 6.

Auxiliary Power

48. Cascade has proposed to provide auxiliary power supply

(emergency power generators) at both its transmitter and studio sites to supply electric power in the event of any failure of regular power sources. Tr. 453; Cascade Ex. 7. During Mr. Simpson's testimony, he stated that the emergency power equipment was necessary due to high wind and storm conditions which prevail during the winter months at the antenna location. He stated that Cascade intended to lease space for the emergency generator and other equipment in an existing structure. Tr. 453–54.

Certification/Lack of Candor Issue against Cascade

49. Cascade's three principals entered into an oral partnership agreement on July 15, 1980, duly reported same in Exhibit 3 of its July 31, 1980 application and stated therein that it intended to reduce this oral agreement to writing at a future date. Cascade Ex. 8, p. 1 and App. A. The testimony as to the July 15, 1980 meeting among the principals was given by Mr. Simpson (Tr. 192–95, 204, 223–24) and was corroborated by Mary Carmen Simpson (Tr. 286–87, 295–96, 310–11, 316–17) and Laura E. Simpson. Tr. 341, 366–68, 370–75. Mr. Simpson stated that the principals intended to reduce the July 15, 1980 oral agreement to writing sometime after the July 31, 1980 application was filed. Tr. 206-07. He testified that in November 1980 he instructed communications counsel to draft a written partnership agreement, which was done in early December 1980. Tr. 170, 209, 225; Cascade Ex. 8, p. 1.

50. With respect to Cascade's December 19, 1980 amendment, Mr. Simpson testified that the agreement was sent to him on or about December 15, 1980 and was received on December 16, 1980. At this time, he informed his partners by telephone of the contents of the draft agreement and attempted to arrange a suitable date to meet for execution of the document. However, since his partners were unable to meet with him immediately, he consulted with communications counsel and decided to submit the partnership agreement in unexecuted form as part of the December 19, 1980 amendment. Pursuant to this plan, Mr. Simpson executed the transmittal letter for the amendment on December 17, 1980. However, having forgotten to arrange for Federal Express delivery, he failed to return the executed December 17, 1980 transmittal letter to communications counsel until after December 19, 1980, the required filing date for the amendment. At this time, Mr. Simpson decided to file the December 19, 1980 amendment in unexecuted form and supplement it later with the executed December 17, 1980 transmittal letter and the executed partnership agreement. Mr. Simpson further testified that Cascade fully stated this fact in the cover letter to its December 19, 1980 amendment. Tr. 171, 185, 210–15, 239–45, 253–55; Cascade Ex. 8, pp. 1–2 and App. B. This version of events is corroborated by the testimony of Mary Carmen Simpson (Tr. 298–99, 318–19) and Laura E. Simpson. Tr. 349–51, 376–78.

51. Mr. Simpson testified that on or about January 2, 1981, the three partners met for purposes of executing the partnership agreement. The opening sentence of the document stated:

> "THIS AGREEMENT is effective the ___ day of July, 1980 by and among John W. Simpson of Los Angeles, California; Mary Carmen Simpson of Los Angeles, California; and Laura E. Simpson of Beverly Hills, California."

Mr. Simpson stated that the partnership agreement was drafted in this form by counsel pursuant to his instructions, since he recalled that his partners and he had met sometime during the month of July 1980 for purposes of orally agreeing to a partnership arrangement. He further stated that the only reason the date was left blank in this opening paragraph was that he was uncertain as to the specific date the three Cascade partners had met. Mr. Simpson stated that, at the January 2, 1981 meeting, he and his partners recalled that their initial meeting occurred on or about July 15, 1980. Accordingly, after establishing the approximate date of the oral agreement, each of the Cascade principals executed the written partnership agreement which was merely a formal written memorialization of an oral agreement which they felt they had reached on or about July 15, 1980. Mr. Simpson stated that each understood that the July date in the opening paragraph of the document was an "effective" date upon which the partners reached agreement, not the date that it was physically signed. He testified that each of Cascade's partners then executed the partnership agreement and returned it to communications counsel, whereupon on or about January 15, 1981, he instructed counsel to type in the "15th" into the opening paragraph of the agreement. Tr. 172, 173, 180, 188, 201–02, 246–53, 256; Cascade Ex. 8, pp. 2–3. Mr. Simpson's testimony as to the January 2, 1981 meeting was corroborated by Mary Carmen Simpson (Tr. 299–300, 321–24) and Laura E. Simpson. Tr. 352–56, 362–63, 379–82.

52. After execution of the partnership agreement and insertion of the "15th" of July, 1980, Mr. Simpson testified that Cascade submitted on January 16, 1981 a supplement to the December 19, 1980 amendment which was comprised of the transmittal letter executed on December 17, 1980 and the partnership agreement executed on or about January 2, 1981. He emphasized that Cascade's January 16, 1981 submission to the Commission was a supplement to its December 19, 1980 amendment, not an amendment itself, and Cascade clearly stated this in its cover letter to its January 16, 1981 supplement. Tr. 176–77, 257–58; Cascade Ex. 8, pp. 3–4 and App. C.

53. According to Mr. Simpson, thereafter fearing that his January 16, 1981 supplement might be construed by the Commission as an effort to submit the executed partnership agreement under the December 17, 1980 transmittal letter, out of an abundance of caution he instructed counsel to submit a letter in explanation to the Commission dated January 22, 1981. In brief, Mr. Simpson stated

that Cascade simply wished the Commission to view the December 17, 1980 transmittal letter and the executed partnership agreement as supplements to the December 19, 1980 amendment, *i.e*., that they were disjunctive, separate supplemental components in the January 16, 1981 submission. Cascade Ex. 4, p. 4 and App. D.

54. Finally, Mr. Simpson states that Cascade's July 31, 1980 application was properly certified by him and accurately reflected the status of the agreement among the principals at that time. The further transmittal letter signed by him on December 17, 1980 and submitted with the January 16, 1981 supplement was not intended to serve as a transmittal letter for a separate and distinct amendment; rather, it was simply a supplement to the December 19, 1980 amendment. Mr. Simpson concludes by stating that neither he nor either of his two partners have in any way intentionally misrepresented facts relating to the certification of Cascade's July 31, 1980 application and its December 19, 1980 amendment. Cascade Ex. 8, pp. 4–5.

Tahoe City Wireless, Limited

The Applicant

55. TCWL is a Colorado corporation formed for the purpose of owning and operating a radio station. TCWL is authorized to issue 50,000 shares of common voting stock with a par value of one dollar per share; there are 10,000 shares issued and outstanding (no shares have been subscribed for). The officers, directors and stockholders of TCWL are as follows (TCWL Ex. 1, p. 1):

Name	*Nature of Interest*	*% of Ownership*
Robert D. Greenlee*	Vice President/ Treasurer, Director	50%
David Margolin	President, Director	50%
Diane M. Greenlee*	Secretary, Director	

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*Held as joint tenants with right of survivorship.

56. Robert D. Greenlee is the president/treasurer, director, general manager and 45% owner of Centennial Wireless, Inc., licensee of radio stations KADE and KBCO (FM), Boulder, Colorado. TCWL Ex. 1, p. 1. Robert D. Greenlee and Diane M. Greenlee, as joint tenants with rights of survivorship, are also 30.5% owners of an AM permittee at Vail, Colorado. *See Memorandum Opinion and Order* FCC 82M-2499, released August 17, 1982.

57. David Margolin is a 4.545% owner of Centennial Wireless, Inc., licensee of radio stations KADE and KBCO (FM), Boulder, Colorado. Mr. Margolin also owns 15.011% of the stock of Bluejay Broadcasting, Inc., licensee of KJKJ (FM), Logan, Utah. TCWL Ex. 1, p. 2.

58. Diane M. Greenlee is the vice president/secretary, director and 45% owner of Centennial Wireless, Inc., licensee of radio

stations KADE and KBCO (FM), Boulder, Colorado. TCWL Ex. 1, p. 2.

59. Mr. Margolin will be the full-time (at least 40 hours per week) general manager of the proposed Tahoe City FM station and will be responsible for all day-to-day operations and programming of the station. Robert and Diane Greenlee are not proposed to be integrated on either a full-time or part-time basis. TCWL Ex. 1, p. 2.

60. Mr. Margolin stated that he intends to move to the Tahoe City area if TCWL receives grant of the construction permit. Tr. 499. He graduated from the University of Wyoming in Laramie, Wyoming in June 1972 with a bachelor of science degree in recreation administration and a bachelor of arts degree in theater. TCWL Ex. 2, p. 1. In June 1975, Mr. Margolin relocated to Denver, Colorado and obtained employment at KADE (AM) in Boulder, Colorado. He was hired for a full-time position as music director in September 1975. In January 1977, he was promoted to the position of program and operations director at KADE (AM) where he is currently employed in the same capacity. His duties include coordination and direction of programming, personnel management, promotions, public affairs and some sales contact. TCWL Ex. 2, p. 2.

Section 73.3514 Issue against TCWL

61. Section 73.3514 of the Commission's Rules requires an applicant to include all information called for by the particular form being filed. TCWL's application was prepared by Robert D. Greenlee, an officer, director and 50% owner of TCWL, based upon his best recollection of the information (specifically, other broadcast and business interests) required by the application form. Tr. 490; TCWL Ex. 3, p. 1. Mr. Greenlee concedes that the application, as originally filed, incorrectly stated that he was vice president (rather than president/treasurer) of an applicant for a new AM station at Vail, Colorado, and that his 40% stock interest in the Vail applicant was held individually (rather than jointly with his wife as joint tenants in common with rights of survivorship). The application also failed to disclose (a) that Mr. Greenlee was a 50% partner during 1968–80 of a publishing company in Fort Collins, Colorado; (b) that Mrs. Greenlee was a director of the Vail applicant as well as a secretary and director of Centennial Wireless, Inc., licensee of stations KADE and KBCO (FM), Boulder, Colorado; (c) that Mr. Margolin, the president, director and 50% owner of TCWL, was employed during 1971–72 as an announcer for station KOJO, Laramie, Wyoming; and (d) that during 1974–75, Mr. Margolin was employed as operations and program director for station KIOZ (FM), Laramie, Wyoming. TCWL Ex. 3, pp. 1–2.

62. Mr. Greenlee states that all the above-mentioned errors or omissions in the TCWL application were inadvertent and occurred in the haste to complete and file the application by the cut-off date.

Moreover, he states that although he reviewed the application subsequent to its filing, the aforementioned errors and omissions were not discovered until NTBC filed a petition to enlarge issues against TCWL citing the discrepancies. Tr. 491–92; TCWL Ex. 3, p. 2. On November 24, 1981, TCWL filed a petition for leave to amend its application to rectify the inaccuracies or omissions in its application. This petition was granted by *Order* FCC 81M-3998, released December 18, 1981. All of the information which had been erroneously reported or omitted from the TCWL application had previously been accurately and completely disclosed to the Commission in connection with other applications prepared and filed by the Greenlees. TCWL Ex. 3, pp. 2–3.

Minority Broadcasters of Tahoe, Inc.

The Applicant

63. Minority is a Colorado corporation. Of the 100,000 authorized shares of common voting stock, 10,000 are issued, 5,000 (50%) to Colleen G. Watts, 4,500 (45%) to Courtney E. Watts and 500 (5%) to Loretta Arlene Kingsbery. Courtney and Colleen Watts are husband and wife. Colleen Watts and Loretta Kingsbery are sisters. Minority Ex. 1.

64. Mrs. Watts will work full time at the proposed station, devoting a minimum of 40 hours per week to the day-to-day operation and management of the station. Minority Ex. 2, p. 3; Ex. 5, p. 1.[10] She will act as director of special programming and community relations and as business manager of the station. Minority Ex. 5, pp. 1–2; Tr. 561. In her programming and community relations positions, Mrs. Watts will be responsible for helping to insure that the station maintains close contact with area organizations and interest groups. Minority Ex. 5, p. 1. As business manager, she will be responsible for overseeing office management, including commercial traffic, bookkeeping and billings. Minority Ex. 5, p. 2.

65. After graduation from high school, Mrs. Watts attended Southern Colorado State College where she earned a B.A. in elementary education and a teacher's certificate in elementary education and Spanish for the elementary schools. Minority Ex. 2, p. 2. Mrs. Watts is of Hispanic origin and her family tree establishes that heritage. Minority Ex. 2, App. A. Spanish was the language

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[10] Originally, Mrs. Watts was a 5% owner of Minority and her sister, Loretta Kingsbery, was a 50% owner. Mrs. Watts was also only a director of Minority and held no officership therein. By amendment to the application, accepted by *Order* FCC 82M-0036, released January 7, 1982, Minority reported the transfer of the 45% ownership interest from Mrs. Kingsbery to Mrs. Watts and Mrs. Watts' assumption of the presidency of Minority. The amendment also reported Mrs. Kingsbery's resignation from the integration proposal. The resignation was occasioned by Mrs. Kingsbery's inability to relocate to Tahoe City following her husband's decision not to move. Tr. 568, 573–79.

spoken in her home and by Mrs. Watts until she entered elementary school. Minority Ex. 2, p. 2. Mrs. Watts is bilingual and has received a masters degree in elementary education with an emphasis on bilingual-multicultural education from the University of Colorado, Denver campus. Minority Ex. 2, p. 2. If Minority's application is granted, Colleen and Courtney Watts will relocate to the Tahoe City area. Tr. 540, 559; Minority Ex. 3, p. 2.

66. Courtney E. Watts is secretary/treasurer and a director of Minority. Minority Ex. 1. Mr. Watts will participate on a full-time basis in the day-to-day operation of the station as its general manager. Tr. 534–35; Minority Ex. 5, p. 2. Mr. Watts is claiming only part-time integration credit, though, because that was his intention as of the cut-off date. Minority Ex. 5, p. 2. From the outset, Mr. Watts has committed himself to devoting 20 hours or more per week to management of the station, including areas of financial management and business planning. Minority Ex. 5, p. 2. Mr. Watts was born in 1948 in Pueblo, Colorado, where he attended elementary, junior high and high school. Minority Ex. 3, p. 1. After his discharge from the U.S. Marine Corps in 1970, he moved to Denver and enrolled at Metropolitan State College. He received his B.S. in management and business in 1974. Since 1976 he has been a partner in a child development center in Denver, a day care center licensed for 150 children. From 1977 to 1982, Mr. Watts was also employed by a real estate development company. Minority Ex. 3, p. 1. Mr. and Mrs. Watts have resided in Englewood, Colorado for the past five years. Minority Ex. 3, p. 2.

67. Loretta Arlene Kingsbery, an Hispanic female, is a director of Minority. She is currently employed as an executive secretary to an oil company official in Denver, Colorado. She will not relocate to Tahoe City if Minority's application is granted. Minority Ex. 4.

68. Neither Minority nor any of its principals has any other broadcast or other media interest. Minority Ex. 6.

Auxiliary Power

69. Minority will have auxiliary power facilities at both its transmitter and studio sites. Tr. 554; Minority Ex. 6.

North Tahoe Broadcasting Company

The Applicant

70. NTBC is a general partnership formed under the laws of the State of Nevada. The general partners and their equity ownership are as follows: Richard D. Russell, 25%; L. R. Grady, 25%; J. A. Schmitt, 25%; N. W. Hughes, 12.5%; and Beverly Hughes, 12.5%. Neither NTBC nor any of its owners has any interest in any medium of mass communications. NTBC Ex. 3.

71. Beverly Hughes is a female and a resident of Incline Village,

Nevada, located about 10 miles from Tahoe City and within the proposed station's coverage area. Tr. 641; NTBC Ex. 5. She has lived there off and on for twelve years and on a permanent basis for eight years. Tr. 641. Ms. Hughes plans to be the station's program director, working a minimum of 40 hours per week at the station. She has been involved in civic activities in the area as a member of the North Lake Tahoe Home Owners Association since 1980 and a member of its board of directors since 1981. She has also been a member of the architectural committee of the Tyrolean Village condominium in Incline Village from 1978-79 and from 1980 to the present. She graduated from Phillips Business College and from the Los Angeles Trade Technical School. Her places of employment include the Pacific Telephone & Telegraph Company (1954-56); North American Aviation Company (1956-57); Irene Dress Design (1958-60); and United Airlines (1960-70), initially as a stewardess and later as a stewardess supervisor. NTBC Ex. 5.

72. N. Wayne Hughes is a resident of Incline Village, Nevada. He plans to be the station's sales manager, working a minimum of 40 hours per week at the station. He has been involved in civic activities in the area as a member of the Tyrolean Village Association in Incline Village, where he served as vice president and a member of the board during 1977-78 and 1980-81. He has been a member of the Incline Village Golf Club since 1980, where he participated in fund raising for the Lakeside Community Hospital. Mr. Hughes graduated from Jefferson City Junior College and has completed numerous pilot training courses. He served as a military pilot during World War II. He was employed for 39 years with United Airlines, advancing to the rank of captain, and was a flight manager for eight of those years. NTBC Ex. 7. He has been retired since September 1981. Tr. 671.

73. L. Robert Grady is a resident of Incline Village, Nevada, having lived there since 1978. He will be the station's full-time general manager. Mr. Grady attended Marietta College for two years. He took courses in business organization and marketing at Northwestern University, as well as other courses at Colorado University. He had a long career as a pilot, including flying for the Air Transport Command during World War II and with United Airlines after the war, until his retirement in 1979. NTBC Ex. 6.

74. Richard D. Russell is a resident of Woodland Hills, California. He will work a minimum of 20 hours per week at the station, assisting in purchasing and maintaining transmitting and studio equipment. Mr. Russell has held or now holds amateur licenses as follows: Novice, technician, general, advanced and amateur extra class. Since 1976 he has been a trustee of the remote base station for the Saddle Peak Amateur Radio Club and president and trustee of the Oat Mountain Amateur Radio Society. He is a charter member of the Cactus Radio Club, which is an advanced UHF communications

system serving an area between Santa Rosa, California and El Paso, Texas. He is a charter member of the United Airlines Amateur Radio Club. NTBC Ex. 3.

75. Mr. Russell currently is a captain with United Airlines. NTBC Ex. 3. He has the time available to spend at least 20 hours per week at the Tahoe City station while still keeping his position as a pilot. He is on reserve, with a maximum of 30 hours per week flight time. He is guaranteed 12 days off per month. Tr. 598. Mr. Russell plans to spend two days in Tahoe City each week, 50 weeks per year, working on station business, probably staying at a hotel while he is there. He would commute from his home in Woodland Hills by plane each week for this purpose. Tr. 607–08, 610. He would schedule his time at the radio station during his 12 days off, so as to insure that he would not be called to duty by United Airlines while he is there. Tr. 611.

76. J. A. Schmitt will be the assistant sales manager and assistant program director of the station, working a minimum of 20 hours per week. He resides in Northridge, California, and is a pilot for United Airlines. Tr. 628, 630–31; NTBC Ex. 4. Mr. Schmitt's schedule with the airline is similar to Mr. Russell's, and he will follow the same approach toward fulfilling his tasks at the station. Tr. 629.

77. Mr. Schmitt has a B.S. degree in psychology from Ohio State University. He also attended Xavier University in Cincinnati, Ohio. Mr. Schmitt was trained as a pilot by the U.S. Navy and was on active duty from 1961 to 1966. When he was released from active duty in 1966, he joined the Naval Reserve where he presently holds the rank of commander. NTBC Ex. 4. However, he plans to terminate his involvement with the Naval Reserve shortly. Tr. 636.

The Women's Network

The Applicant

78. Network is a limited partnership established for the purpose of constructing and operating a commercial FM radio station in Tahoe City, California. John S. MacInnis and Donna L. Heinle, M.D., are the general partners and, collectively, have an 85.10% partnership share. The remaining 14.90% share of the partnership is held by four limited partners. John S. MacInnis, a general partner and 31.91% owner of Network, will be full-time general manager with overall responsibility for establishing and operating the proposed station. Tr. 709; Network Exs. 1 and 2. Mr. MacInnis is not formally employed at the present time and is supervising the construction of a residence for his family at Tahoe Donner, which is approximately 13–14 miles from Tahoe City. Tr. 710–11, 716. Donna L. Heinle, M.D., a general partner and 53.19% owner of Network, is the wife of John MacInnis. Dr. Heinle is employed at the Washoe Medical Center in

Reno, Nevada, where she is involved in treating indigent and welfare patients in a county clinic operated at the hospital. Tr. 723–25; Network Ex. 1.

79. Dr. Heinle practices in association with other doctors and usually works an 8-½ hour day for two weeks straight and then is off for nine days straight. Tr. 725–6. Dr. Heinle proposes to devote in excess of 80 hours a month to station programming and management. Network Ex. 2. She states that she will fulfill this commitment by working eight hours a day for the nine-day period in which she is not engaged in her medical practice (a total of 72 hours) and one or two evenings a week during those periods when she is engaged full time in her medical practice. Tr. 735–37. Dr. Heinle states that this commitment might decrease once the station is established and that, moreover, she might work on station matters at home. Tr. 742–44. Dr. Heinle and her husband currently live in Reno, Nevada, and, as mentioned above, are in the process of relocating their full-time residence to Tahoe Donner, California. Tr. 715–16.

Financial Issue against Network

80. Based on the *Hearing Designation Order*, Network is required to show the ability to meet construction and first three months operating costs of $72,326. To meet these construction and operating costs, Network has obtained a letter dated February 11, 1982 from the Truckee River Bank, Truckee, California, stating that the bank would be willing to lend John MacInnis and Donna L. Heinle, M.D., a gross amount of $70,000 at prevailing interest rates at the time of the loan, repayable over a 30-year period with interest only due during the first three months of the loan. Mr. MacInnis and Dr. Heinle have stated that it is their intention to make available any funds borrowed from the Truckee River Bank (pursuant to the terms of the above-mentioned letter) to Network for the purpose of constructing and operating the proposed Tahoe City station. Network Ex. 3; Bureau Ex. 1.[11]

81. The *Hearing Designation Order* also found that Mr. MacInnis would have sufficient excess current and liquid assets over current liabilities to meet his $30,000 financial commitment to Network. Mr. MacInnis has reaffirmed that he will provide $30,000 of his own funds to Network to meet anticipated construction and first three months operating costs. Tr. 720–21.

North Shore Broadcasters

The Applicant

82. At the time of designation for hearing, North Shore was a

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[11] Truckee River Bank's commitment letter dated February 11, 1982 was attached to an amendment filed February 18, 1982 by Network. That amendment, heretofore not acted upon, IS HEREBY ACCEPTED.

general partnership composed of three partners, Chris W. Kidd, David L. Metts and Geneva H. Heavin. Originally, it was proposed that Mr. Metts and Ms. Heavin would be integrated full time; however, subsequent to designation, Mr. Metts and Ms. Heavin voluntarily withdrew from the application. Accordingly, for comparative purposes, North Shore does not have an integration proposal. *See Order* FCC 82M-0809, released March 12, 1982.

83. Mr. Kidd is a 30% stockowner in Foothill Broadcasting Corporation, permittee of a new Class A FM broadcast station located at Placerville, California. Tr. 842; North Shore Ex. 1. Mr. Kidd states that Placerville is approximately 90 miles southwest of Tahoe City. Tr. 845.

Financial Issue against North Shore

84. North Shore estimates that its construction and first three months operating expenses will total $38,940. North Shore Ex. 5. Chris W. Kidd is in fact (but not for comparative purposes) the sole proprietor of North Shore. North Shore Ex. 1. Mr. Kidd's financial statement of February 25, 1982 shows cash on hand in the amount of $60,000 and current liabilities in the amount of $1,200, or net liquid assets in the amount of $58,800. North Shore Ex. 5. However, as of March 22, 1982, Mr. Kidd testified that he had cash on hand of only $50,300. Tr. 919. Moreover, Mr. Kidd stated that his balance sheet of February 25, 1982 did not reflect a liability of $14,388 of Kidd Communications, a sole proprietorship; nor did it reflect additional current liabilities in the amount of $1,600 over and above the $1,200 reflected on his balance sheet of February 25, 1982. Tr. 944, 960. Taking into consideration this reduction in current liquid assets and increase in current liabilities, Mr. Kidd has net liquid assets in the amount of $42,812, or approximately $3,872 over and above the anticipated $38,940 in construction and first three months operating costs.

Ultimate Findings and Conclusions

Financial Issue against High Sierra

85. High Sierra will require $196,395 to construct and operate its proposed station for three months, to be financed by a $200,000 loan from American Commercial Bank of Ventura, California. A limited financial issue was specified against High Sierra because the bank's original commitment letter did not indicate either the rate of interest or necessary collateral for the loan. Subsequently, however, the bank issued new commitment letters which cured these technical defects. A financial issue was also specified because High Sierra did not submit a letter from its equipment supplier to support a credit of $132,360. Although no supplier documentation was subsequently submitted, the principals of High Sierra have indicated their

unconditional willingness to apply their combined net worth to construct and operate the station. Given the fact that the principals' combined quick assets alone are nearly $500,000, High Sierra obviously is not in a position where it requires a supplier's credit to commence station operations. Thus, the absence of supplier documentation is moot. Accordingly, the financial issue against High Sierra is resolved in its favor.

Abuse of Process Issue against High Sierra

86. The crux of the charge against Robert Fox of High Sierra is that (1) he threatened Stanley Soho with the public broadcasting of the California Medical Board's proceedings against him, unless Dr. Soho withdrew his financial support of Mary Alice Renteria's application, and (2) he effectuated his threat despite Dr. Soho's compliance. The issue must be resolved in High Sierra's favor. First, there simply is no record of any public broadcast regarding Dr. Soho's expose made by station KNXT-TV, Los Angeles, California.[12]

87. Secondly, Mr. Fox denies making any threats. The last call that Mr. Fox made to Dr. Soho was made in the presence of High Sierra principal Ira Laufer, who denies hearing Mr. Fox make any threats to Dr. Soho. The record reflects that both Mr. Fox and Mr. Laufer are persons of noteworthy accomplishment and proven, long-term dedication in the broadcast field. They appeared to be trustworthy and the testimony of each is worthy of the highest credence and is given the fullest possible weight. Dr. Soho's testimony, on the other hand, cannot be accorded significant weight. The record indicates that on at least two occasions his memory proved faulty. First, he asserted that the Arizona Medical Board found him no guilty of the California charges. The truth of the matter is that the Arizona Board automatically revoked his license upon his California revocation. Secondly, Dr. Soho recalls that Mr. Fox's first call to him lasted long enough to include discussion on the Mt. Pluto transmitter site, the merits of Ms. Renteria's application and High Sierra's rule making proceeding. In point of fact, telephone records show that the call lasted less than one minute.

88. The discrepancies in Dr. Soho's testimony are substantial in that they are reflective of the fact that Dr. Soho has difficulty in perceiving facts objectively when he is personally involved. His account of Mr. Fox's threat is not credible and his allegations concerning same are completely discounted.

89. Furthermore, Dr. Soho attributes to Mr. Fox a statement disparaging minorities' involvement in broadcasting. This belies Mr. Fox's record of promoting female and minority participation in

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[12] Dr. Soho claims that he was notified in advance of the program and that he videotaped it and took notes, but that he has since erased the tape and destroyed the notes.

broadcasting and his demonstrated concern for equal opportunity generally.

90. The preponderance of the evidence indicates that Mr. Fox made no threats to Dr. Soho. In light of the foregoing, the abuse of process issue is resolved in High Sierra's favor.

Certification/Lack of Candor Issue against Cascade

91. The hearing record is devoid of any substantive evidence that Cascade's application, filed July 31, 1980, and a December 19, 1980 amendment thereto were improperly certified; moreover, there is no substantive evidence to suggest that Cascade was lacking in candor with the Commission in connection with its filing of the above-mentioned application and amendment.

92. Cascade's partnership agreement clearly states that the agreement is effective the 15th day of July, 1980. Mr. Simpson has stated under oath that the July 15, 1980 date was specified solely to reflect the fact that the written partnership agreement memorialized the oral agreement reached among the partners on July 15, 1980. Hence, the agreement stated that it was effective as of July 15, 1980, the date on which the partners reached oral agreement, not that it was physically signed on that date. The written partnership agreement was drafted in December 1980, executed in January 1981 and reflected an oral understanding reached among the general partners on July 15, 1980. Although the partnership agreement was executed by the general partners on or about January 2, 1981, they affixed their signatures with the understanding that it reflected their July 15, 1980 oral agreement. Cascade's original application, filed with the Commission on July 31, 1980, was properly certified as required by law in that it was certified by Cascade principal John W. Simpson on July 30, 1980, and reflected an oral partnership agreement that had been entered into prior thereto. The facts are clear and uncontroverted that there was no written partnership agreement prior to July 31, 1980. The July 15, 1980 date was inserted into the written partnership agreement solely to reflect the effective date, not the actual preparation and execution, of the written partnership agreement. Cascade's January 16, 1981 submission to the Commission was a supplement to an amendment, not an amendment itself. As a supplement to its December 19, 1980 amendment, Cascade submitted an executed copy of the December 17, 1980 transmittal letter and an executed copy of the partnership agreement. The cover letter to the January 16, 1981 submission stated that it was a supplement to the December 19, 1980 amendment and not a separate amendment itself. The entire point of the January 22, 1981 submission was to point out to the Commission that a misperception could be drawn from the way the December 19, 1980 amendment and the January 16, 1981 supplement were filed. In addition, Mr. Simpson has stated under oath that neither he nor

either of his two partners has in any way intentionally misrepresented the facts relating to the certification of their July 31, 1980 application and December 19, 1980 amendment.

93. The certification/lack of candor issue must be resolved in Cascade's favor on both a basic and comparative basis.

Section 73.3514 Issue against TCWL

94. TCWL concedes that the errors and omissions which appeared in its original application constitute a departure from the disclosure requirements of Section 73.3514 of the Commission's Rules. However, the record reflects that the conceded errors and omissions were inadvertent and occurred as a result of oversight. There is no evidence to suggest that TCWL principals attempted to conceal information or deceive the Commission. Indeed, since all the omitted or erroneous information had previously been fully and accurately reported to the Commission in connection with other applications, there would be no motive or purpose for TCWL to intentionally omit or falsely report such information; moreover, the omissions or inaccuracies in the TCWL application would have no adverse bearing on the character or comparative qualifications of TCWL. Finally, as soon as the inaccuracies and omissions were called to the attention of TCWL, a corrective amendment was filed. Thus, the evidence of record does not establish fraud, intentional concealment or other serious misconduct reflecting on the basic character qualifications of TCWL. Accordingly, TCWL merits a very slight demerit for this technical violation of the Rules. *Town & Country Radio, Inc.*, 70 FCC 2d 572, 44 RR 2d 149 (Rev. Bd. 1978). *Accord, Midwest Broadcasting Company*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979.

Financial Issue against Network

95. Network has submitted a letter from Truckee River Bank which, while admittedly not a contractually binding commitment, nonetheless demonstrates the reasonable assurance to Network of the availability of $70,000 above the $33,000 previously demonstrated. The record evidence thus supports a finding that Network will have more than sufficient funds available to it to meet anticipated construction and first three months operating expenses in the amount of $72,326. Accordingly, the financial issue against Network must be resolved in its favor and Network is found to be financially qualified to construct and operate its proposed facilities.

Financial Issue against North Shore

96. North Shore has met its financial issue with a last-minute amendment, which was accepted by *Order* FCC 82M-0810, released March 12, 1982, and admitted into evidence as North Shore Exhibit 5, and an equipment supplier's commitment letter, admitted as

North Shore Exhibit 6. In its financial amendment, North Shore projects construction and three months operating expenses of $38,940. The financial statement of Chris Kidd which accompanied North Shore's amendment shows that Mr. Kidd had $60,000 in liquid assets on February 25, 1982, compared to just $1,200 in liabilities. Although in cross-examination it was disclosed that Mr. Kidd has dissipated some assets and ignored some liabilities which properly should have been included in his financial statement, it appears that, even assuming the worst, he will have a substantial cushion of available funds over expenses. With this showing and the submission of an equipment lease letter properly setting forth the terms of the lease and the willingness of the lessor to make the lease, North Shore has demonstrated its financial qualifications.

Comparative Issue

97. All of the applicants have been found basically qualified and must now be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement, supra*, at 394.

Diversification of the Media of Mass Communications

98. High Sierra's principals, Ira E. Laufer, Robert L. Fox and David A. Loe, collectively, own 100% of stations KVEN and KHAY(FM), Ventura, California. While Ventura and Tahoe City are in the same state, the cities are more than 300 miles distant from one another.

99. With respect to TCWL's principals, David Margolin owns 15.011% of station KJKJ(FM), Logan, Utah, and 4.545% of stations KADE and KBCO(FM), Boulder, Colorado. These ownership interests are not controlling interests, and the stations involved are far removed from Tahoe City, the proposed city of license. Robert D. and Diane M. Greenlee, collectively, own 90% of the stock of Centennial Wireless, Inc. and, thus, control stations KADE and KBCO(FM), Boulder, Colorado. The Greenlees also have a 30.5% interest in a corporation which holds a permit for a new AM broadcast station at Vail, Colorado.

100. With respect to North Shore, its principal, Chris W. Kidd, owns a 30% interest in a permittee for a new FM station at Placerville, California (which is approximately 90 miles southwest of Tahoe City).

101. Under the diversification criterion, since Cascade, Minority, NTBC and Network have no mass media interests, each is entitled to a slight preference over High Sierra, TCWL and North Shore.

Among High Sierra, TCWL and North Shore, none is entitled to a preference under the diversification criterion.

Best Practicable Service

102. In determining which applicant will insure the best practicable service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners, including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement, supra*, at 395. The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Substantial time is deemed to be in excess of 20 hours per week. *Midwest Broadcasting Company, supra.*

103. *High Sierra.* High Sierra has no full-time integration proposal; moreover, it cannot receive part-time integration credit for its principals since none of them is committed to working at least 20 hours per week at the proposed station.[13]

104. *Cascade.* All three of Cascade's principals have made commitments to be integrated full time in management level positions—John W. Simpson as general manager, Mary Carmen Simpson as program director and Laura E. Simpson as director of news. Accordingly, based on the record evidence, Cascade is entitled to 100% quantitative integration. Moreover, since Cascade has two female owners who will be integrated full time, some qualitative enhancement accrues to Cascade's quantitative integration credit. *Waters Broadcasting Corporation*, 88 FCC 2d 1204, 1211, 50 RR 2d 1110, 1115 (Rev. Bd. 1981); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1959, 44 RR 2d 1351, 1355 (Rev. Bd. 1978); *Midwest Broadcasting Company, supra*, 70 FCC 2d at 1496, 45 RR 2d at 8. Finally, Cascade's quantitative integration is also slightly enhanced in that all three principals propose to reside in the Tahoe City service area should Cascade receive a grant of the application. *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2143, 44 RR 2d 127, 139 (Rev. Bd. 1978), *aff'd*, 86 FCC 2d 423, 49 RR 2d 606 (1981).

105. *TCWL.* TCWL will integrate David Margolin, its 50% owner, as full-time general manager. Mr. Margolin's integration is enhanced by his approximately nine years of past broadcast experi-

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[13] High Sierra receives no credit for its principals' part-time integration because 20 hours per week is the minimum cognizable level for integration purposes. *Midwest Broadcasting Company, supra; Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 51 RR 2d 1604 (Rev. Bd. 1982).

ence in the areas of programming and operations, his past residency in the service area and his pledge to move to the Tahoe City service area should TCWL's application be granted. *Policy Statement*, *supra*, 1 FCC 2d at 396; *Alexander S. Klein, Jr.*, *supra*.

106. *Minority*. Minority will integrate a 50% owner, Colleen G. Watts, into full-time management of its station, and a 45% owner, Courtney E. Watts, into part-time management (20 hours per week). Minority will receive full credit for Mr. Watts' part-time integration.

107. No credit will be given for Mrs. Watts' proposed integration because to do so would constitute an impermissible post-designation improvement of Minority's comparative position. At the time *Order* FCC 82M-0036 was released (January 7, 1982), it was believed that Loretta Kingsbery's withdrawal from management was "involuntary" in that it was occasioned subsequent to her marriage and when her husband decided that it would not be feasible to relocate to Tahoe City, and that, but for this "inability" to move, she would have continued in management as originally proposed. However, recent Review Board decisions[14] indicate that a post-designation resignation from an integration proposal is considered voluntary and any substitution after designation of a principal is viewed as a diminution of an applicant's integration proposal followed by an attempted prohibited upgrading. Because Minority does not merit integration credit for Mrs. Watts, it is also not entitled to any enhancement because of her status as a minority (Hispanic) female. *WPIX, Inc., New York*, 68 FCC 2d 381, 43 RR 2d 278 (1978).

108. *NTBC*. NTBC proposes the full-time integration of L. Robert Grady as general manager, N. Wayne Hughes as sales manager and Beverly Hughes as program director. These three principals have partnership interests of 25%, 12.5% and 12.5%, respectively.[15] Thus, NTBC is entitled to a quantitative full-time integration credit of 50%; and its full-time integration credit is slightly enhanced by local residence, civic participation and Beverly Hughes' female status. *Waters Broadcasting Corporation*, *supra*. NTBC also has proposed the part-time integration of Richard D. Russell and J. A. Schmitt, who each have a 25% partnership interest in the applicant. The record evidence shows that Mr. Russell will be primarily involved in equipment maintenance and technical matters rather than management functions; accordingly, NTBC is not entitled to any part-time integration credit for him. *New Continental Broadcasting Co.*, 88

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[14] *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 590, 51 RR 2d 1478, 1483 (Rev. Bd. 1982); *Birmingham Family TV, Inc.*, 91 FCC 2d 348, 52 RR 2d 525 (Rev. Bd. 1982).

[15] NTBC claims 60% full-time integration and 40% part-time integration on the grounds that the partnership agreement reallocates degrees of control. However, no authority for this view is cited and the argument is rejected.

FCC 2d 830, 839, 50 RR 2d 1117, 1125 (Rev. Bd. 1981); *Deep South Radio, Inc.*, 71 FCC 2d 138, 141, 45 RR 2d 573, 576 (Rev. Bd. 1979).

109. With respect to Mr. Schmitt, NTBC proposes that he be integrated part time as assistant sales manager and assistant program director. The record evidence does not disclose how he will divide his time between these functions, nor does it discuss the management nature of Mr. Schmitt's proposed functions. In this regard, it is noted that N. Wayne and Beverly Hughes are, respectively, sales manager and program director and have responsibility for making the day-to-day management decisions which their titles imply. Since Mr. Schmitt does not have the day-to-day responsibilities for sales and programming, it is impossible to determine whether his commitment to participate part time in management is substantial; presumably, his functions would primarily involve meetings and consultations with the full-time sales manager and program director, rather than any significant policy or management role in these areas. At any rate, his part-time integration proposal is simply too imprecise and amorphous in content to warrant any credit. *Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1094–95, 50 RR 2d 1251, 1255 (Rev. Bd. 1982); *Deep South Radio, Inc.*, *supraf0; Grand Broadcasting Co.*, 36 FCC 925, 929–32, 2 RR 2d 327, 338–41 (1964).

110. *Network.* Network will integrate John S. MacInnis, a 31.91% general partner, as full-time station manager; his integration commitment is slightly enhanced by the fact that he will move to the Tahoe City service area. *Alexander S. Klein, Jr.*, *supra.* Network also proposes the part-time (80 hours per month) integration of Donna L. Heinle, M.D., in "programming and management." Dr. Heinle proposes to work 72 hours concentrated over a nine-day period, with the balance of her commitment, *i.e.*, at least eight hours, over the remainder of the month. Dr. Heinle's commitment of 80 hours per month does not qualify for part-time integration credit since she does not propose to devote at least 20 hours per week to management functions. *Midwest Broadcasting Company*, *supra.* Moreover, Dr. Heinle's integration proposal does not disclose how she would divide her time between management functions (for which integration credit attaches) and non-managerial program functions (for which no integration credit attaches). Thus, aside from the fact that Dr. Heinle's integration proposal does not qualify under the minimum weekly time standard, her proposal is also too imprecise to warrant integration of ownership with management credit. *Deep South Radio, Inc.*, *supra.* Since Network is not entitled to integration credit for Dr. Heinle, and since it does not propose to integrate any of its limited female partners, no integration enhancement attaches to Network's female ownership. *WPIX, Inc., New York*, *supra*, 68 FCC 2d at 411–12, 43 RR 2d at 315–16; *Mid-Florida Television Corporation*, 69 FCC 2d 607, 651–52, 43 RR 2d 811, 857–58 (Rev. Bd. 1978).

111. *North Shore.* North Shore has no integration proposal and, therefore, for comparative purposes is not entitled to any integration credit.

Auxiliary Power

112. Only Cascade and Minority propose to establish auxiliary power sources. Accordingly, these applicants will receive a very slight comparative preference. *Addendum To Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966); *Bradley, Hand and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982).

Final Comparative Analysis

113. In sum, the following quantitative credits are warranted: High Sierra, none; Cascade, 100% full time; TCWL, 50% full time; Minority, 45% part time; NTBC, 50% full time; Network, 31.91% full time; and North Shore, none. Qualitative attributes of participating owners may increase or enhance the value of integration proposals, but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981). With the exception of the comparison between NTBC and TCWL (both with 50% full-time integration), there are clear quantitative differences between all of the above-mentioned applicants and, thus, with respect to those applicants, qualitative enhancement factors are not of decisional significance. *Scott and Davis Enterprises, Inc., supra*, 88 FCC 2d at 1096, 50 RR 2d at 1256. However, as between TCWL and NTBC, NTBC's enhancement for local residence, civic participation and female status outweighs TCWL's enhancement for past broadcast experience, past residence in the service area and future local residence. Furthermore, NTBC receives a slight preference over TCWL under the diversification criterion, and TCWL is charged with a very slight demerit for its technical violation of Rule 73.3514.

114. Based solely on quantitative integration credit, Cascade is entitled to an overwhelming preference over High Sierra, Minority and North Shore. *See, e.g., Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 45 RR 2d 1709 (Rev. Bd. 1979). As among Cascade, Network, NTBC and TCWL, Cascade is entitled to a substantial integration preference. *See, e.g., Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 47 RR 2d 1265 (Rev. Bd. 1980). NTBC and TCWL are entitled to a significant preference over Network and a substantial preference over High Sierra, Minority and North Shore. *See, e.g., Deep South Radio, Inc., supra*; *Poet's Seat Broadcasting, Inc., supra*. Network is entitled to a significant preference over High Sierra, Minority and North Shore; and Minority is entitled to a slight preference over High Sierra and North Shore. *See, e.g., Deep South Radio, Inc., supra*

(significant preference); *Gilbert Group, Inc.*, 88 FCC 2d 401, 50 RR 2d 87 (Rev. Bd. 1981) (slight preference).

115. Based upon all of the foregoing, the ranking of the applicants in order of preference is as follows: Cascade, NTBC, TCWL, Network, Minority, North Shore, High Sierra. It is, therefore, concluded that the public interest, convenience and necessity would be best served by a grant of the Cascade application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of John M. Simpson, Mary Carmen Simpson and Laura E. Simpson, d/b/a Cascade Communications Company (File No. BPH-800731AC), for authority to construct and operate a new FM broadcast station on Channel 243 at Tahoe City, California, IS GRANTED; and the applications of High Sierra Broadcasting, Inc. (File No. BPH-800118AJ), Tahoe City Wireless, Limited (File No. BPH-800829AD), Minority Broadcasters of Tahoe, Inc. (File No. BPH-800829AI), R. D. Russell, L. R. Grady, J. A. Schmitt, N. W. Hughes and B. S. Hughes, d/b/a North Tahoe Broadcasting Company (File No. BPH-800829AM), Donna L. Heinle, John S. MacInnis, Sadako Okino Decollo, Virginia Hsieh Le Roux, Dorothy Standing Bear Pellerin and Frances Strychaz, d/b/a The Women's Network, A Limited Partnership (File No. BPH-800829AW), and Chris W. Kidd, David L. Metts and Geneva H. Heavin, d/b/a North Shore Broadcasters (File No. BPH-800829BE), ARE DENIED.[16]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

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[16] In the event exceptions are not filed within 30 days a of this Initial Decision and the Commission does not review its own motion, this Initial Decision shall become effective its public release pursuant to Rule 1.276(d).

Frequency Equitable Distribution of under 307(b)
Review by Review Board
Service, Improvement of, B/C
Television Station, Authorization
White Area

Review Board affirmed ID and granted TV application for relocation of transmitter site. Net loss of Grade B service to 1,116 persons (white area) outweighed by net gains in second service (7,353 persons), third (150,413), fourth (22,182), third network service (213,490), and by overall net gain of 194,455 persons. Current Commission policy bars consideration of translators and cable TV service as mitigating factors.

-*KTVO, Inc.*
BC Docket No. 81-326

FCC 83R-98

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of KTVO, INC. (KTVO-TV) Kirksville, Missouri	BC Docket No. 81-326 File No. BPCT-780720IB
For Modification of Television Construction Permit	

Appearances

Chester F. Naumowicz and *Donald E. Ward*, on behalf of KTVO, Inc. (KTVO-TV); and *Stephen Yelverton* and *Charles E. Dziedzic*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: December 5, 1983; Released: December 13, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD: BOARD MEMBER JACOBS ISSUING A SEPARATE STATEMENT, IN WHICH BOARD MEMBER MARINO JOINS.

1. This proceeding involves the application of KTVO, Inc. (KTVO-TV) (KTVO) for authority to modify its existing facilities by changing its transmitter site, reducing effective radiated power, and increasing antenna height above average terrain of its Station

KTVO-TV, Channel 3, Kirksville, Missouri. By *Memorandum Opinion and Order* (*Designation Order*), FCC 81–228, 46 Fed. Reg. 27756, published May 21, 1981, *recon. dismissed*, 87 FCC 2d 467 (1981), the Commission designated the application for hearing on issues: (1) to determine what areas and populations would gain or lose service if the application were granted and the availability of other Grade B television service to those areas and populations; (2) to determine based on the evidence so adduced whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), a grant of the application would provide a fair, efficient and equitable distribution of radio service; and (3) to determine ultimately, based on the resolution of the preceding issues, whether the application should be granted. By *Initial Decision* (*I.D.*), FCC 83D-32, released June 20, 1983, presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) granted the KTVO application after finding that, although 5,022 persons would lose their only predicted Grade B television service, this loss was outweighed by the provision of a new first service to 3,906 persons and a second service net gain of 7,353 persons, as well as other net gains in service. *Id.*, para. 19.

2. The proceeding is now before the Review Board on exceptions filed July 20, 1983 by the Chief, Mass Media Bureau (MM Br.), limited exceptions and brief in support of the *I.D.* filed July 20, 1983 (and amended by erratum filed July 22, 1983) by KTVO (KTVO Br.), and reply briefs filed by the parties on August 12, 1983 (MM Reply and KTVO Reply, respectively) (MM Reply amended by erratum filed August 18, 1983). The Board has reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held October 14, 1983, and our examination of the record. Except as otherwise modified herein, we adopt the findings of fact in the *I.D.*

3. While the judgments to be made in relocation cases are not at all easy ones, we find that a balance of policy interests here favors an affirmation of the *I.D.* and its grant of the KTVO application. Calling for, as such cases do, a careful weighing of all of the positive and negative factors which would attend a grant of the instant application, we conclude that the ALJ is correct in his assessment that KTVO has shown that the greater public interest would be served at least as well by a grant of its relocation application and, further, that the benefits of a grant to it overcome any detriment to the public that could occur as a result. We believe that we might best explain our own conclusion by directly addressing the counter arguments raised by the Mass Media Bureau.

4. In his findings of fact, the ALJ determined that a grant of KTVO's application would increase the coverage of the station's Grade B contour from 13,589 square miles to 17,484 square miles, for a *net area gain* of 3,895 square miles; he further found that KTVO's

Grade B population coverage would increase from 394,786 persons to 589,241 persons, for a *net coverage gain* of 194,455 persons.[1] It was also shown that an estimated 5,022 persons would lose currently predicted Grade B service, 3,906 other persons would gain their first Grade B service (leaving a *net loss* of an estimated 1,116 persons), but that 7,353 persons (net) would gain a second Grade B service, 150,413 persons (net) a third, and 22,182 persons (net) a fourth.[2] As to Grade B network service, the estimates project that while 5,022 persons would lose off-the-air ABC service, 218,512 would gain it for the very first time.[3]

5. The Mass Media Bureau has not excepted to the above estimates of gains and losses, and thus they are accepted as accurate for decisional purposes.[4] But, despite the very high ratio of overall service gains over losses, the Bureau argues, in essence, that the critical figure to be considered is the loss of Grade B service to the 5,022 persons now within the predicted KTVO contours.[5] It states that mere "net gains in service, standing alone" are insufficient to justify a grant.[6] For that proposition, the Bureau relies heavily on *Triangle Publications, Inc.*, 37 FCC 307 (1964), where the Commis-

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[1] The table provided by KTVO shows:

	(Sq.Mi.)		*Population*	
Contour	*Present*	*Proposed*	*Present*	*Proposed*
Total	13,589	17,484	394,786	589,241
Gain		6,039		277,937
Loss		2,144		83,482
Net Gain		3,895		194,455

I.D., para. 4.

[2] The table provided by KTVO shows:

Number of Other Services	*Gain*		*Loss*		*Net Gain*	
	Area (sq.mi.)	*Population*	*Area* (sq.mi.)	*Population*	*Area* (sq.mi.)	*Population*
0	201	3,906	332	5,022	−131	−1,116
1	312	8,491	75	1,138	237	7,353
2	3,453	170,640	268	20,227	3,185	150,413
3	1,247	75,108	1,299	52,926	−52	22,182
4	809	19,751	62	436	747	19,315
5 or more	17	41	108	3,733	−91	−3,692
Total						194,455

I.D., para. 5.

[3] *See* Table at *I.D.*, para. 6.

[4] Any objection to an initial decision not advanced in an exception is legally waived. 47 CFR §1.277(a).

[5] KTVO offered to serve these present viewers with two television translator stations already licensed to it. But the Commission apparently declined to consider translator service as a substitute for the current Grade B signal. *See Designation Order*, at para. 10; *see also infra* at paras. 10–11 for a further discussion of this matter.

[6] MM Br., at 3.

sion denied a transmitter relocation which would have removed 37,912 persons from the station's Grade B contour and opined:

> . . . [o]nce in operation, a station assumes an obligation to maintain service to its viewing audience and the withdrawal or downgrading of existing service is justifiable only if offsetting factors are shown which establish that the public generally will be benefited.

Id ., at 313 (*citing Hall* v. *FCC* , 237 F.2d 567 (D.C. Cir. 1956)). Interpreting *Triangle* , the Bureau stoutly contends: "Nowhere did the Commission state that mere service gains off-setting losses are a public interest factor which would justify a transmitter relocation." Accordingly, the Bureau's case against the KTVO grant can be briefly encapsulated as follows:[7]

> The *I.D* . found that 5,022 persons would lose their only predicted Grade B television service and presumably the only off-setting public interest factor was a net gain in service to other areas. However, it is well-established Commission policy that mere service gains, standing alone, do not off-set a loss of service.

6. Before examining KTVO's "limited" exceptions on this same issue—exceptions which essentially go to the ALJ's rejection of evidence proffered in alleged mitigation of any perceived service loss—we believe we must first explore the Bureau's compact formulation of the basic policy regarding the appropriate consideration of service gains, if any, in the context of proposed transmitter relocation cases. As indicated above, the Bureau argues staunchly that the public interest focus in such cases is to be predominantly on service *losses* , not *gains* , and that an applicant proposing any relocation that would result in a service loss must successfully demonstrate something other than "mere" service gains. In its brief, the Bureau describes that "something" as a "compelling public interest reason,[8] and it quickly discounts any corresponding service gains (however disproportionate) as an offsetting public interest factor by asserting[9]

> Merely wanting to increase a station's overall service area or to encroach upon a more lucrative television market is a private economic reason and not a compelling public interest consideration.

In the Bureau's view, illustrations of the compelling public interest showing necessary to permit a move creating any service loss are "technical problems with providing service within the station's predicted contours, serious questions of financial survival . . .. or other matters beyond the control of the licensee."[10]

7. We reject as impermissibly one-dimensional the Bureau's

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[7] MM Br., at 2.

[8] MM Reply, at 4.

[9] *Id* .

[10] *Id* . At oral argument before the Board, Bureau counsel reiterated its position

rigid assertion that service gains are essentially entitled to no public interest consideration in mitigation of any service loss (however disproportionate), and we also reject its completely unsupported postulate that, absent a showing of technical factors beyond the licensee's control, a proposed relocation engendering a Grade B service loss of *any* magnitude must be automatically denied. Not only is the Bureau's position unsupported by prior case law or other agency policy pronouncement, it is plainly inconsistent with the weight of pertinent authority. First and foremost, it sharply conflicts—in our view—with the clear implication of the Commission's *Designation Order* in this very case wherein the primary issue to be addressed is[11]

> 1. To determine what areas and populations would *gain or lose* service if the application were granted, and what other television services of at least Grade B level are available to those areas and populations.

Were the matter of service *gains* to be fundamentally unrelated to the ultimate public interest judgment to be made herein, we are at a loss to explain why the Commission would have expressly ordered an examination of that specific factor. This is especially so since the Commission was consciously aware at the time it designated the "gain and loss" issue that KTVO's proposed relocation would, in fact, entail a potential service loss of in excess of 5,000 persons.[12] Notwithstanding, it specifically ordered a hearing inquiry to factually determine "what areas and populations would gain" service as a result of the proposed move. Thus, by virtue of the rather plain mandate of Issue 1, above, neither the ALJ nor we could effectively disregard any relevant service gain showing. The Bureau, however, would apparently have us do exactly that—simply ignore KTVO's large projected service gains. Indeed, and as we apprehend the bedrock legal and policy position taken by the Bureau in this case, the actual magnitude of service gains is all but irrelevant in relocation proceedings and could *never* be sufficient to overcome a smaller service loss, even if the actual ratio of gains over losses were, for instance, 50:1. The Bureau's theory, if fully accepted here, leaves no room whatever for any public interest comparison of projected gains and losses.

8. However, and apart from the unavoidable implication of Issue 1 of the Commission's *Designation Order* , the Bureau's insistence that projected service gains are essentially irrelevant to the ultimate

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that the only public interest showing appropriate for consideration in relocation requests would be "some type of technical or terrain factors or financial survival of the station or something beyond control of the licensee." Tr. 48–49.

[11] *See Designation Order* , at para. 13 (emphasis added).

[12] *See id* ., at para. 10 where the Commission noted that KTVO's "proposed modification would create an unserved area—an area outside the Grade B contour of any television station—of 429 square miles with a population of 5,475 persons."

public interest judgment called for by the Commission is further refuted by history and precedent. For example, in a leading case heavily relied upon by the Bureau, *Triangle, supra* , the Commission carefully devoted eight painstaking pages of its deliberations to a comparative analysis of "Areas and Populations of Gain and Loss." *See* 37 FCC at 309–316. And, although it denied the particular relocation request there at issue, particularly because of a potentially severe adverse impact to UHF television, *see id* , at 309, 319–323, the Commission specifically found that Triangle's proposed move would "result in a net loss of Grade B service to 1,272,889 persons," *id* ., at 310 (footnote omitted), and that—in addition—37,912 persons would lose *all* commercial Grade B service, *id* ., at 313. The Commission then duly considered the gains and losses and stated:

> A predicted net gain of 500 persons within the proposed grade B contour is certainly de minimis and can hardly be considered as outweighing the loss of all commercial service to 37,912 persons and a choice of service to 5,448 persons, particularly where no white areas are eliminated. [Footnote omitted].

Id ., at 312–313. Hence, and contrary to the Bureau's current position, it seems evident from *Triangle* that a weighing of gains and losses of areas and populations is rather an integral part of the larger public interest analysis employed by the Commission in passing upon transmitter relocation requests. That proposition is affirmed by recent cases as well. *See, e.g., WEST, Inc* ., 80 FCC 2d 233, 243, 245 (1980), where a licensee's transmitter relocation request was approved despite being short-spaced and despite urgent allegations of adverse UHF impact. That result turned, in part, on the Commission's finding that the WSET-TV transmitter relocation would result in "a large gain in the population served," *id* ., at 246, compared to which the corresponding loss area containing approximately 500 persons was "*de minimis* ." *Id* . In the case before us, KTVO will continue to fully cover its city of license; it presents no short-spacing problem; it would experience a net gain of approximately 4,000 square miles and 200,000 persons; it would bring the first ABC network service to 218,512 persons[13]; and, on the negative

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[13] We must acknowledge that a prior Review Board considered the aspect of first ABC network service to over 200,000 persons in connection with a previous KTVO relocation request and remarked:

> We recognize that KTVO's proposal would provide a first ABC network service to a substantially greater number of people than those who would lose their only television service but, in light of the importance of the above objective regarding white areas, we do not think that the benefit of serving a larger population with an additional network service is significant enough to outweigh the detriment that would result from a grant of KTVO's proposal.

KTVO, Inc. , 63 FCC 2d 770, 774 (Rev. Bd. 1977), *review denied* , FCC 78–164, released March 7, 1978. However, that earlier judgment was entirely gratuitous since—unlike the instant case—the designated issues in the 1977 hearing contained side, it would have a net "white area" loss of only, 1,116 persons. The other proposed relocation cases cited in the Bureau's pleadings lend no greater support for its severe position here than does *WSET* ; all are distinguishable for one critical reason or another. Just for example, in *Sarkes Tarzian, Inc.* , 8 FCC 2d 869 (1967), the relocation applicant would have moved 54.6 miles from its city of license and would not even have placed a Grade B signal over the city, all in derogation of FCC signal coverage rules; in *Central Coast Television* , 14 FCC 2d 985 (Rev. Bd. 1968), the applicant would have moved 40 miles from its city of license, failed to cover that city with a Grade B signal, created extreme shadowing, impaired seriously UHF development, and rendered additional service only to areas that were already adequately served; in *West Michigan Telecasters, Inc.* , 26 FCC 2d 668 (1970), the applicant would have been also short-spaced, would have engendered a service loss to 40,000 persons, and would have adversely affected UHF television. And, to the extent relevant, *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372 (1976)—a "comparative renewal" case cited by the Bureau—also involved a short-spacing problem, *see id.*, at 379–389. In fact, not one single relocation case cited by the Bureau for support of its position here is not complicated by either short-spacing problems and/or serious UHF impact considerations not present in the case before us.

9. Not only is the Bureau's instant position not supported by previous relocation case law, its super-strict posture here is utterly irreconcilable with the language and thrust of a very recent statement of apparent general policy regarding transmitter relocation requests wherein the Bureau declared:

> The Commission would generally prefer to defer to the judgments of licensees as to the selection of transmitter sites. It is the licensee, not the Commission, that has the best information on such factors as population moves, the availability and suitability of sites for broadcasting and the costs associated with moves. In fact, the Commission has recently taken action that will expand the licensee's latitude in this area. In *Suburban Community Policy,* 53 R.R. 2d 681 (1983) (reconsideration pending), among other things, it abolished the *de facto* realloca-

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no "service gains and loss" issue comparable to Issue 1 herein: the two issues before the 1977 Board were a UHF impact issue and an issue to determine whether the Commission's principal city coverage requirement (*see* 47 CFR §73.685) should be waived. *See* 63 FCC 2d at 771 nn. 2 & 4. In its present proposal, KTVO needs no principal city coverage waiver and no UHF impact issue was designated against it. Moreover, since the Board's 1977 *KTVO* decision, it has specifically considered third network service to areas theretofore not covered as a significant public interest benefit, and in a recent case it granted a transmitter relocation request even in the face of potentially severe UHF impact. *See Central Alabama Broadcasters, Inc* ., 88 FCC 2d 1501, 1564 (Rev. Bd. 1982) (first CBS service to 61,199 persons in proposed Grade B contour), *review denied* , FCC 83–210, released May 2, 1983, *appeal pending sub nom* . *WCOV, Inc* . v. *FCC* , No. 83–1557 (D.C. Cir.); *see also WSET, Inc* , *supra* , where the Commission noted that as a result of the relocation proposed therein "there will also be a large population in the gain area receiving ABC service for the first time." 80 FCC 2d at 246.

tion policy, which was one factor that limited the choice of transmitter sites in some cases.

Westinghouse Broadcasting and Cable, Inc. (WPCQ-TV), MM Docket No. 83–1160 *et al.*, Mimeo No. 467, released October 31, 1983, at para. 6 (per delegated authority, Chief, Mass Media Bureau). In view of all of the foregoing, we find that the potential net loss of Grade B service to 1,116 persons (out of a total of 589,241 persons within the projected KTVO Grade B service area) to be more than overcome by the totality of benefits that would accompany a grant in this particular case. The proposed relocation will provide both new and competitive broadcast service (including a third network service) to tens of thousands of viewers, will cause harmful interference to no existing station, and the anticipated audience gains are sufficiently large to ensure a significantly expanded revenue base from which the station might greatly upgrade its existing service. On the other hand, a denial will benefit only a little over 1,000 persons now on the outer fringe of KTVO's presently predicted Grade B contour, about whom the discussion below is substantively relevant.

10. Cognizant of the Commission's stated concern over any loss of Grade B service to existing viewers (*see supra* para. 7 & note 12), KTVO sought at hearing to show (1) that there would be no actual loss area because it would immediately cover any such area with simultaneous coverage via two television translator stations already licensed to it to serve the impacted area[14]; (2) that two CATV systems are currently serving the projected loss area and that, as a practical matter, nobody will be deprived of all television service[15]; and (3) that area television stations other than KTVO are "significantly viewed" according to Part 76, Appendix B, of the Commission's rules, thus rebutting the presumption that viewers in the loss area will be left without acceptable off-the-air television service. The ALJ, supported by the Bureau, rejected KTVO's proffer in support of these claims.[16] Although supporting the *I.D.* in general, KTVO excepts to these evidentiary rulings.

11. While our resolution of KTVO's "limited" exceptions would appear to be non-decisional in light of our indicated affirmation of the ALJ's favorable ruling on the ultimate relocation issue, we will nonetheless address the exceptions raised by KTVO to allay any uncertainty as to their correctness. Insofar as KTVO's proffer respecting its proposed substitute translator service to the loss area, we find that the Commission's *Designation Order* appears dispositive. That order referenced a prior attempt to relocate by KTVO and stated:

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[14] KTVO Exh. 1.

[15] *Id.*

[16] *See I.D.*, at n.1.

> In that [prior *KTVO, Inc.*] case, we affirmed our longstanding policy that translators cannot compensate for the loss of primary service. Rather, translators may only be used to compensate for such loss where special circumstances exist, such as terrain obstructions, that are substantially beyond the control of the licensee.

Id., at para. 10. Thus, the ALJ's rejection of the translator evidence appears consistent with the evident import of the *Designation Order*. With respect to the material relating to CATV service, we likewise agree with the ALJ. *See I.D.*, at n.1 (and cases cited therein).[17] [18] As to KTVO's contention relating to the "significantly viewed" signals listed in our cable television rules, we need only observe that the status of these signals is subject to periodic change, *see KCST-TV, Inc.* v. *FCC*, 699 F.2d 1185 (D.C.Cir. 1983) (Commission should recognize changes in viewing patterns to determine whether station is, in fact, "significantly viewed" in a particular area), and we cannot find that those distant stations referenced by KTVO—even if listed as "significantly viewed"—are currently relied upon (if at all) by more than a minority segment of the viewers in the actual projected loss area.[19] Consequently, its exceptions to the ALJ's rulings on these points are rejected.

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[17] *See also Central Alabama Broadcasters, supra* note 13, 88 FCC 2d at 1533 (*citing Monroe County Board of Comm'rs*, 72 FCC 2d 683, 686 (1969) (CATV service no substitute for over-the-air service; public "should be given the option to choose between cable television and broadcast services."))

[18] Nor are we persuaded by KTVO's referral to us of certain languate contained in the aforementioned *Westinghouse Broadcasting* case (*see supra* para. 9). In the October 31, 1983 order accompanying the hearing designation of that much more recent transmitter relocation application, the Mass Media Bureau Chief (by delegated authority) stated, in pertinent part, as follows:

> In the past, the Commission has granted applications that would create loss areas only where the applicant has shown, in addition to gain areas, other factors that would offset the losses. *Factors that could be considered include the extent to which: there may be a greater need for the service in the gain area than in the loss area*; the residents in the loss area, in fact, rely on the station's off-the-air service; *any losses might be mitigated by existing services such as translators, low power television stations or cable television service. . .*

Id., at para. 8 (emphasis added). Although we concede that the underscored portions of this latest order could be read to support KTVO's position with respect to some of the evidence proffered herein, we respectfully decline to disregard apparently settled Commission case law on the basis of this authority alone. We do note, however, that the Bureau's order in *Westinghouse* again verifies that service gains are indeed to be considered as at least one public interest factor which might "offset the losses" (*id.*) in apparent contradiction of its oppugnant position in the present case. As to the other off-set factors (*i.e.*, CATV; translators) suggested in *Westinghouse*, above, we strongly encourage the Bureau to internally review this matter and to clarify its position so that others might be on notice in future proceedings.

[19] "Significantly viewed" is a term-of-art indigenous to cable television regulation and is defined as a television station signal that is sufficiently viewed in any portion of a particular county so as to achieve a certain measurable rating position in that county. The formula used to determine such status is:

CONCLUSION

12. As we expressed at the outset of our review of this case, the ultimate determination of whether KTVO should be permitted to move its transmitter and thereby alter its present coverage area depends, in the final analysis, on whether a refusal to sanction such a move would satisfy a larger public interest than a grant. In our view, the ALJ reasonably balanced both positive and negative factors and concluded that the public interest benefit of serving several hundreds of thousands of new viewers with ordinary (and first ABC network) service outweighed the net loss of predicted Grade B service to an estimated 1,100 persons situated along the outer limit of KTVO's present contour. Further, as we apprehend Commission precedent, the Media Bureau's inflexible contention that only technical considerations beyond the control of the licensee can justify a transmitter move creating any potential loss area—however lopsided the concomitant service gains—is overly stringent and precludes a fair or balanced consideration of all relevant circumstances affecting the transcendent public interest. In so concluding, we need not speculate on whether the latitudinarian tenor of the recent *Westinghouse* language cited herein is purposefully intended to signal a relaxation of existing relocation policy or standards; the Bureau—which issued the subject *Westinghouse* order—can itself make that discernment. And, while we emphatically do not intend this decision to imply that any licensee who can demonstrate some measurable surfeit of service gains over corresponding losses will automatically be authorized to relocate, we do believe that the larger public interest goals of the Communications Act[20] and the Commission's historic policy of encouraging broadcast licensees to maximize the service potential of their assigned frequencies militate toward a grant in this particular case where the benefit/loss ratio is so overwhelmingly disproportionate that a denial of the application would seem almost spiteful by comparison.

13. ACCORDINGLY, IT IS ORDERED, That the application of KTVO, Inc. (KTVO-TV) (File No. BPCT-780720IB) for authority to modify its existing facilities at Kirksville, Missouri IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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(1) For a full or partial network stations—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent.

See 47 CFR § 76.5(k); *see also KCST-TV, Inc*, v. *FCC, supra.*

[20] *See, e.g.*, 47 U.S.C. § 307(b) directing the Commission to provide for a distribution of radio and television frequencies that is "efficient" as well as "fair. . .and equitable." A grant here would satisfy each of those § 307(b) criteria.

SEPARATE STATEMENT OF BOARD MEMBER JACOBS, in which BOARD CHAIRMAN MARINO JOINS

Note 18 of our Decision today describes how the Mass Media Bureau is rethinking its position on mitigation evidence for perceived service losses, and that it may now believe that "any losses [of a station's off-the-air television service] might be mitigated by existing services such as translators, low power television stations or cable television service . . . ." *Westinghouse Broadcasting and Cable, Inc. (WPCQ-TV),* Mimeo No. 467, released October 31, 1983, para. 8. This latest Bureau view appropriately takes into account the impact of modern technological conditions on off-the-air service losses, *e.g.*, that 34.5 percent of television households in the United States presently have cable service, and that 62.7 percent of such households have cable passing in front of them. Tr. 90–93. However, our Decision notes that this broader outlook may conflict with existing Commission precedent. See Note 17 therein. We encourage the Bureau to review the policy implications of this matter, internally clarify its position, and seek updated guidance from the full Commission on service loss mitigation showings, so that future decisions are not controlled by what may be outmoded past precedent.

FCC 83D–32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of KTVO, INC. (KTVO-TV) Kirksville, Missouri For Modification of Television Construction Permit	BC Docket No. 81–326 File No. BPCT-780720IB

Appearances

Chester F. Naumowicz and *Donald E. Ward* on behalf of KTVO, Inc. (KTVO-TV); and *Brian Kilbane* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

(Issued: June 10, 1983; Released: June 20, 1983)

Preliminary Statement

1. This proceeding involves the application of KTVO, Inc. (KTVO-TV) (KTVO) to modify its construction permit so as to change its transmitter site, reduce effective radiated power (ERP) and increase antenna height above average terrain (HAAT) of KTVO-TV, Channel 3, Kirksville, Missouri.

2. By *Memorandum Opinion and Order* released May 15, 1981 (FCC 81–229), the above set forth application of KTVO, Inc. was designated for hearing on the following issues:

> 1. To determine what areas and populations would gain or lose service if the application were granted, and what other television services of at least Grade B level are available to those areas and populations;
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether, pursuant to Section 307(b) of the Communications Act of 1934, as amended, a grant of the application would provide a fair, efficient and equitable distribution of [television] service; and
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the application should be granted.

3. Prehearing conferences were held on October 7, 1981 and May 6, 1982, and the hearing was conducted on July 7, 1982. The record

was closed on July 28, 1982 (Order, FCC 82M-2339, released July 30, 1982). KTVO and the Mass Media Bureau have submitted proposed findings of fact and conclusions of law on October 20, 1982, and replies thereto were filed on January 28, 1983.

Findings of Fact

4. KTVO proposes to move its transmitter site 30.5 miles southeast of its present location, and to change its facilities from 100 kW ERP at 1080 feet to 84 kW ERP at 1973 feet (KTVO Exhibit 1, p. 2). The areas and populations which would gain or lose Grade B service are as follows:

	Area (Sq.Mi.)		*Population*	
Contour	*Present*	*Proposed*	*Present*	*Proposed*
Total	13,589	17,484	394,786	589,241
Gain		6,039		277,937
Loss		2,144		83,482
Net Gain		3,895		194,455

(KTVO Exhibit 1, Table I.)

5. The following is a tabulation of the predicted number of available Grade B services to the areas and populations gaining and losing Grade B service from the proposed KTVO relocation:

Number of Other	*Gain*		*Loss*		*Net Gain*	
Services	*Area* (sq.mi.)	*Population*	*Area* (sq.mi.)	*Population*	*Area* (sq.mi.)	*Population*
0	201	3,906	332	5,022	−131	−1,116
1	312	8,491	75	1,138	237	7,353
2	3,453	170,640	268	20,227	3,185	150,413
3	1,247	75,108	1,299	52,926	−52	22,182
4	809	19,751	62	436	747	19,315
5 or More	17	41	108	3,733	−91	−3,692
Total						194,455

(KTVO Exhibit 1, Table I.)

6. The figures set forth below represent the predicted gain and loss of Grade B ABC network service as a result of KTVO's proposed relocation:

	Area (Sq.Mi.)	*Population*
Gain	4,942	218,512
Loss	332	5,022
Net Gain	4,610	213,490

7. As shown above, the relocation of KTVO's transmitter site would deprive an area of 332 square miles with 5,022 people of its only predicted Grade B television service. The "white" area that

would be created by the proposed modification lies within portions of Wayne and Decatur Counties, Iowa and Grundy and Mercer Counties, Missouri (Joint Exhibit I). The move would, however, bring a first predicted Grade B television service to a net population of 3,906 persons residing in 201 square miles; a second Grade B television service to 8,491 persons (net 7,353) residing in 312 square miles (net 237); and a third Grade B television service to 170,640 persons (net 150,413) residing in 3,453 square miles (net 3,185) (KTVO Exhibit 1, Table I). Furthermore, the move would provide KTVO's television service to a net population of 194,455 persons, and a first ABC network service to a net population of 213,490 persons residing in an area of 4,610 square miles.[1]

8. Although the proposed modification would result in the withdrawal of KTVO's predicted Grade B signal from an area of 332 square miles not lying within the predicted Grade B contour of any other station, applicant contends that the area would not go "unserved". It submits that the evidence of record demonstrates that KTVO is not the only station upon which the residents of the proposed "white" area depend, and that, in fact, KTVO is not even the area's primary station. KTVO argues that viewing surveys conducted by the Nielson rating service, specifically those for the years 1979, 1980 and 1981 for the pertinent Missouri and Iowa counties (KTVO Exhibit 3), demonstrate that television stations other than KTVO are viewed substantially in these Iowa and Missouri counties, and that during these years, KTVO captured less than one-half of the viewing audience within these Counties. Based on these Nielson survey figures, KTVO projects that its total share of actual viewing within these four counties varied from 8.5 percent to 15.2 percent and averaged 11.3 percent; and, on the assumption that the pattern for country-wide viewing holds true for each community within that county, applicant postulates that KTVO commands only a small minority of the total viewing audience within the proposed "white" area.

9. As further evidence of KTVO's alleged minority share of the

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[1] The Presiding Judge excluded KTVO's proffer of evidence of its intention to provide translator service to the loss area in view of the Commission's longstanding policy that translators cannot compensate for the loss of Grade B off-the air service. See *Memorandum Opinion and Order*, FCC 81–229, released May 15, 1981, p. 10. Similarly, KTVO's proffer of evidence to show the availability of CATV service in the proposed "white" area was rejected on the basis that the Commission does not consider CATV service a substitute for off-the-air television service. See *Monroe County Board of Commissioners*, 72 FCC 2d 683 (1979); *TV Table of Assignments*, 35 FCC 2d 510 (1972); and *Santa Fe Television, Inc.*, 18 FCC 2d 741 (1969).

viewing audience within the proposed "white" area, KTVO refers to the results of a survey conducted by Marshall Williamson, Director of Engineering for KTVO's parent corporation (KTVO Exhibit 2). According to his report, Mr. Williamson canvassed the proposed "white" area, surveying a total of 340 residences, or approximately 15 percent of the persons residing within the Grade B "white" area. Mr. Williamson reports the following: that of the residences surveyed, nine percent watched KTVO exclusively, and four percent of the observed fixed antennas were oriented towards KTVO; that a total of 22 percent of the residences surveyed did not watch KTVO at all, and of the observed fixed antennas, 36 percent were oriented away from KTVO; and that 69 percent of the households reported that they watched both KTVO and other television stations, and, 125 or 75 percent of the observed antennas were rotary and therefore capable of being oriented towards either KTVO or other television stations. On the basis of the results of the Williamson and Nielson surveys, KTVO argues that the conclusion is inescapable that television stations other than KTVO place signals of acceptable quality over the proposed "white" area, and that KTVO's share of actual viewers within the area is, and has been, relatively small. It submits, therefore, that the creation of a "white" area is more theoretical than real, and that few, if any, persons would actually lose their only or even their primary television service; and that to the extent that some possibility exists for a small number of persons losing their only off-the-air television service, the counterbalancing benefits resulting from the proposed modification would far outweigh the possible loss to a small segment of the public of their only television signal. KTVO lists as these countervailing benefits the following: that KTVO would bring a new predicted Grade B service to a net population of 194,455 persons residing in an area of 3,895 square miles; that the areas and population that would gain a new Grade B service are approximately triple those which would lose such service; that a significant proportion of the areas and populations to be newly served are presently underserved; that there would be a net "gray" area gain of 7,353 persons residing in 237 square miles; and that a third predicted Grade B signal could be brought to a net population of 150,413 persons residing in an area of 3,185 square miles.

10. The Bureau opposes the requested modification on the basis that it is not in the public interest. It contends that the mere fact that the proposed relocation would deprive 5,022 people in an area of 332 square miles of their only Grade B television service requires a denial of KTVO's instant application. Although the Bureau acknowl-

edges that certain benefits would result from the proposed modification, it states that these benefits would not outweigh the loss to the 5,022 people of their only television service.

11. With respect to the findings of the above referenced Nielson surveys, the Bureau argues that they cannot be considered substantive evidence in this proceeding, since the weight to be given such studies has not been demonstrated on the record. Similarly, it argues that the results of the Williamson survey must also be rejected, on the basis that an area's "white" status cannot be discounted by the results of a survey which appear to show that people will view a lesser grade of service.

12. In reply, KTVO concedes that the Nielson reports are not exact to the precise value stated; however, it nevertheless argues that the country-wide viewing patterns ascertained by Nielson surveys are reasonably accurate, and that the Commission presumes that country-wide rating patterns obtain throughout all portions of the country. It submits, therefore, that the Nielson surveys are significant evidence of its claim that the individuals residing in the proposed Grade B "white" loss area can and do view other signals, and, if deprived of KTVO's signal, would not lose the only television signal available to them. KTVO considers the quality of the television signals viewed within this "white" area as irrelevant; the only relevant factor being that people residing within the proposed "white" area view television signals other than that of KTVO. With respect to the decisional significance of the Williamson survey, KTVO contends that it consists in helping to establish its claim that the viewing pattern in the Grade B "white" loss area is not dissimilar from the country-wide pattern established by the Nielson surveys.

Conclusions of Law

13. Any deprivation or degradation of television service to any group of individuals is *prima facie* not in the public interest. Therefore, a party proposing a modification of transmitter site must demonstrate that there are sufficient countervailing public interest factors to offset the deprivation or degradation of service that would result from the proposed modification.

14. KTVO concedes that under the Commission's standard prediction method, a "white" area would be created by the relocation of its transmitter site. It asks, however, that the Presiding Judge give full weight to the results of the Nielson and Williamson surveys which, it contends, demonstrate that viewers within the predicted "white" area view television signals other than KTVO's. It submits,

therefore, that the proposed modification would result in the loss of only KTVO's signal, and that viewers within the predicted "white" area would continue to view other television signals. KTVO requests that the Presiding Judge find that the proposed modification would not result in the creation of a true "white" area.

15. KTVO argues, in the alternative, assuming that a Grade B "white" area would be created by the proposed modification, that it has demonstrated that the benefits to the public resulting from the proposed relocation of KTVO's transmitter site far outweigh the loss of television service to 5,022 persons living in a 332 square mile area.

16. Although the results of the Williamson survey and to a lesser extent the Nielson surveys, appear to indicate that there is extensive beyond Grade B contour viewing in the predicted Grade B "white" area, there is no indication in the record of the quality or the predictability of the other television signals received in the area. The Presiding Judge notes, in this regard, that although Rule 73.686(b) of the Commission's Rules provides for the taking of field strength measurements to determine the true propagation effect of a television signal, applicant has not come forward with the results of any field strength measurements for television signals received in the area. In addition, it is further noted that applicant does not represent that any television signal other than KTVO's, received within the predicted "white" area, is the equivalent or near equivalent of a Grade B signal. Therefore, even if we assume the relevancy of the Nielson surveys and conclude on the basis of the results of the Williamson survey and the Nielson surveys that KTVO's share of the listening public within the predicted "white" area is small, comparatively speaking, the fact that the majority of viewers within the area view signals other than KTVO's may be due to a special effort on their part to capture a more distant signal or the willingness of these listeners to sacrifice quality of signal for programming content. In the absence of any evidence as to the intensity, within the "white" area, of any television signal other than KTVO's, the Presiding Judge must find that all other television signals received in the predicted "white" area are of less than Grade B quality; and that the proposed modification would result in the creation of a Grade B "white" area.

17. The Commission's number one priority in licensing television broadcast facilities is to provide at least one television service to all parts of the United States, and its number two priority is to provide each community with at least one television broadcast station. See *Television Assignments*, Sixth Report and Order, 41 FCC 148, 167 (1952). In this instance, the proposed modification would result in the

loss to 5,022 persons of their only Grade B television service, while 3,906 persons would receive their first television service, and a gain for 8,491 persons of their second over-the-air television service, while depriving 1,138 persons of their second television service. Although of little decisional significance, it is also noted that there would be a net gain of 194,455 persons who would receive KTVO's signal for the first time, and a net gain of 213,490 persons receiving their first ABC network service.

18. The decision whether or not to permit the proposed modification requires a careful weighing of the benefits to be derived from the proposed modification against the loss to 5,022 persons of their only predicted Grade B television service. After carefully considering the evidence of record and the arguments of both the Bureau and KTVO, the Presiding Judge concludes that the proposed modification would be in the public interest, and that a grant of the instant application would provide for a fair, efficient and equitable distribution of television service.

19. In this instance, 5,022 persons would lose their only predicted Grade B television service. However, a total of 3,906 persons would receive their first Grade B television service. In addition, a net gain of 7,353 persons would receive their second over-the-air television service. Although the number of persons losing their only Grade B television service exceeds by 1,116 persons the number gaining their first television service, a net "gray" area of 7,353 persons would also be eliminated. The Presiding Judge is of the opinion that this additional factor, namely the elimination of a net "gray" area of 7,353 persons, as well as the other net gains in service, tips the scale in favor of a grant of the proposed modification. The Presiding Judge finds therefore that there are public interest factors present here which were not present in *KTVO, Inc. (KTVO-TV)*, 63 FCC 2d 770 (Rev. Bd. 1977) and *Triangle Publications, Inc.*, 37 FCC 307 (1964), cited by the Bureau as precedent for denying the instant application; that the decisions in *KTVO* and *Triangle* are therefore not controlling here, and the application will be granted.

Ruling

20. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R.

1.276, the application of KTVO, Inc. (KTVO-TV) (BC Docket No. 81-326, File No. BPCT-780720IB) IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[2] **In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).**

Common Carrier, Bureau

Order adopted regarding Common Carrier Bureau's analysis of effects of federal decisions on local telephone service. Record of this proceeding will be incorporated in CC Docket 78–72, Phase IV, *48* **FCC 2d** *30153.*

–Local Telephone Service.

FCC 83–567

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Petition of the State of Michigan Concerning the Effects of Certain Federal Decisions on Local Telephone Service	CC Docket No. 83–788

ORDER

(Adopted December 1, 1983; Released December 21, 1983)

BY THE COMMISSION:

1. On July 27, 1983, we adopted a *Notice of Inquiry* in this proceeding in response to a petition by the State of Michigan. Michigan asks us to review the cumulative effects of certain federal decisions on local rates and the availability of local service. The Report presented to us today by the Common Carrier Bureau staff is the culmination of their investigation of the issues raised by Michigan. The staff's analysis and conclusion that our policies do not threaten universal service reinforces our findings that our actions are in the public interest and, indeed, serve to ensure universal service in the long run.

2. The staff findings are important contributions to the debate surrounding changes in the industry. Further, they relate directly to our monitoring proposal in CC Docket 78–72, Phase IV. 48 Fed. Reg. 30153, June 30, 1983. By our action here, we officially accept this document from the staff. The conclusions reached in the Report will be used in further developing our monitoring plan and assessing future actions.

3. Accordingly, IT IS HEREBY ORDERED that the staff Report be published as a Commission Report.

4. IT IS FURTHER ORDERED that the Secretary shall send copies of the Report to the regulatory commissions of the various states, districts, territories and possessions affected by the policies examined in the report.

5. IT IS FURTHER ORDERED that Docket 83–788 is hereby TERMINATED. The record of this proceeding will be incorporated into CC Docket 78–72, Phase IV. Any correspondence or comments related to this Report shall be captioned for inclusion in CC Docket 78–72 Phase IV.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

ANALYSIS OF THE EFFECTS OF FEDERAL DECISIONS ON LOCAL TELEPHONE SERVICE

A Report after Inquiry in CC Docket 83-788

Common Carrier Bureau
December 9, 1983

I. *INTRODUCTION AND SUMMARY*

This report is the culmination of an Inquiry instituted by the Federal Communications Commission in response to a petition filed on February 24, 1983, by the State of Michigan and the Michigan Public Service Commission (Michigan). In that petition, Michigan asked the FCC to review the cumulative effects of certain FCC decisions and the AT&T divestiture on the price for and availability of local telephone service.

Michigan sought investigation of the effects of the following five decisions: (1) preempting state control over depreciation for intrastate ratemaking;[1] (2) imposing interstate access charges;[2] (3) expensing station connections and amortizing previously capitalized investment;[3] (4) eliminating the interstate revenue requirement associated with embedded customer-premises equipment (CPE);[4] and (5) divestiture by AT&T of the Bell Operating Companies (BOCs), as approved by the District Court.[5] We granted the Michigan petition, and to establish the necessary record upon which we could base conclusions, we requested the state commissions to provide us with certain information concerning their regulatory activities.[6] The principal requests concerned past and pending rate requests and authorizations; influence of FCC decisions and other factors on rate changes; and evidence of subscriber discontinuances and studies of demand elasticities. We received responses from twenty-seven states and the District of Columbia.[7]

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[1] Amendment of Part 31 (CC Docket No. 79–105), 89 FCC 2d 1094 (1982), *recon.* 92 FCC 2d 864 (1983), *review pending sub nom.* Virginia State Corporation Commission v. FCC, No. 83–1136 (4th Cir., filed February 11, 1983).

[2] MTS and WATS Market Structure (CC Docket No. 78–72, Phase I), 48 Fed. Reg. 10319 (Mar. 11, 1983) (Third Report and Order), *recon.*, 48 Fed. Reg. 42984 (Sept. 21, 1983), *review pending sub nom.* NARUC v. FCC, No. 83–1225 (D.C. Cir.).

[3] Amendment of Part 31 (CC Docket No. 79–105), 85 FCC 2d 818 (1981).

[4] Amendment of Part 67 (CC Docket No. 80–286), 89 FCC 2d 1, *reconsid. denied*, 91 FCC 2d 558 (1982), *review pending sub nom.* MCI Telecommunications Corp. v. FCC, No. 82–1237 (D.C. Cir.).

[5] United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom* Maryland v. United States, 103 S. Ct. 1240 (1983).

[6] 48 Fed. Reg. 26189 (Aug. 9, 1983). A complete listing of the data requested can be found in Part II, *infra.*

[7] Submissions were received from Alabama, Arizona, Colorado, Connecticut, the District of Columbia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Vermont, Virginia, West Virginia and Wisconsin. The state of Oregon advised that it is inquiring into the effects of federal decisions in the state of Oregon but it submitted no formal evidence at this time. We invite the state of Oregon to submit its findings to the FCC at the conclusion of that proceeding. Similarly we welcome information from the several other states that have related inquiries or studies in progress and have noted their intention to forward their results to us. These will be helpful in our ongoing monitoring efforts.

We also solicited comments on the states' submissions from all interested persons; twenty-one parties filed comments.[8] We have reviewed all of the reports and comments listed as well as other available information. Late-filed state reports and comments are accepted.

Our principal findings in this investigation are:

1. In almost all cases, revenue requests by exchange telephone companies vastly exceed actual revenue authorizations by state commissions.

2. The bulk of the current revenue requests by exchange telephone companies are linked to factors other than the federal decisions highlighted by the Michigan Petition.

3. Federal decisions will not cause sharply higher minimum charges for obtaining residential service. Based on our study, we have determined that the average increase resulting from the cumulative effects of the decisions addressed amounts to only $6.80 per month in 1989 for residential customers who choose to purchase their own telephones This reflects a compound annual growth rate of 6 percent per year.

4. There is no evidence that federal decisions will cause residential subscribers to discontinue service, and thus threaten "universal" telephone service.

5. The FCC should continue to monitor the effects of federal decisions on local rates and the number of subscribers.

In this proceeding, we sought to obtain the information necessary for a comprehensive analysis of the relationship of our decisions to pending state rate proceedings and of our decisions' likely effects on telephone penetration. We also plan to use the methods and findings developed here in structuring our access monitoring program which will examine the effects of access charges on rates and universal service over the next six years.[9]

This report does not dwell on the benefits of our decisions, nor does it repeat the analyses that led to our decisions.[10] These decisions are based on our conviction that they will bring consumers greater choices, lower long distance rates, lower local exchange rates in the long term through deterrence of uneconomic bypass, and widely-available modern technology and services. Critics of these decisions frequently lose sight of these benefits.

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[8] Parties filing comments on the state reports were the Ad Hoc Telecommunications Users Committee, American Telephone and Telegraph Company, the Bell Operating Companies (BOCs), the State of California, Congress Watch *et. al.*, the Consumers Energy Council of America, the General Telephone and Electronics Telephone Companies (GTE), International Communications Association, Mountain Bell, the National Telecommunications and Information Administration, New York Department of Public Services, New York Telephone, the North American Telephone Association, the North Carolina Attorney General, Ohio Office of the Consumers' Counsel, Pacific Northwest Bell, Pacific Telephone (and Bell of Nevada), South Dakota Public Utilities Commission, Southwestern Bell, the United States Independent Telephone Association and United Telecommunications (United).

[9] MTS and WATS Market Structure (CC Docket No. 78–72, Phase IV), 48 Fed. Reg. 30153 (June 30, 1983).

[10] These decisions are summarized in Appendix 1. Regarding benefits to consumers, *see, e.g.*, Access Charge Order, 48 Fed. Reg. 10319 at paras. 26ff, 122 ff, 137 ff.

Users will benefit from significant toll rate reductions resulting from our access policies. Today, a 10.5% interstate MTS rate reduction is pending at the FCC.[11] Further reductions are a certainty if our policies are implemented fully. Because 55% of MTS usage is by residential users, these rate decreases will be widely realized. Additionally, because customers pay more in toll charges than basic ratecharges systemwide, the significance of toll reductions cannot be overemphasized.

The depreciation changes will increase rates at the outset but the effects will be felt less and less each year. Further, our policies on customer premises equipment (CPE) allow all consumers to save money and offer consumers choices that were unimagined a decade ago.

Besides these benefits, our policies are designed to ensure the long run viability of universal service. The serious threat to universal service of uneconomic bypass has been discussed at length in our Access Charge Order. We underscore very briefly here that bypass by only a small portion of customers can have far reaching consequences. By way of example, the Bell System calculates that just six percent of its customers generate 61% of its total gross interstate revenues. One study shows that in Texas, 39 percent of the operating companies' large customers are now bypassing and 17 percent more plan to do so within the next three years. In New York state, 0.3% of business customers produce 33% of business toll revenues. In California, 1.2 percent of business customers generate 30 percent of long distance business revenues. In Georgia, 0.5 percent of business customers generate 50 percent of business long distance calling revenues and in Nebraska, 0.3 percent of businesses bring in 28 percent of business long distance revenues.[12]

These large accounts are prime bypass candidates and, as the percentage figures strongly suggest, if these businesses leave the network, rates for "captive" ordinary citizens inevitably will rise for two reasons. First, when bypass occurs, bypassers no longer make their disproportionately high contributions toward the fixed costs of the telephone network. Second, the costs of telephone network equipment put into place to serve these large customers is left "stranded" in the network, and its costs must be picked up by the remaining customers through increased rates. This could threaten universal service.

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[11] The adequacy of the size of this reduction is under investigation by the Commission.

[12] The figures in this paragraph were reported in Wines, Michael, "Teleports May Be the Newest Threat to Bell Companies' Local Dominance," *National Journal* (November 12, 1983) 2348.

Our decisions will cause most customers to bear the costs of facilities dedicated to their use and some users to lose the benefits of subsidies they once enjoyed. For some users, these losses will not be fully offset by the benefits of the decisions in the short term. This will increase the basic charge for those services that have been heavily subsidized. Despite our cautious provision of gradual implementation, the Universal Service Fund, and the lifeline waiver, there may be some subscribers who will need to turn to lifeline or access-only services to retain network service. Such alternatives are available. The best evidence indicates that very few subscribers will give up service in response to the rate increases that may occur.

It is important to note that in reaching the decisions identified in the Michigan petition, we considered carefully the impact each would have on telephone subscribers and we weighed the costs and benefits in each case. In each of the FCC decisions identified in the Michigan petition, our actions were guided by the objective of the Communications Act of 1934 to regulate "interstate and foreign . . . communications . . . to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges . . . . "[13] While we pursued the goal of efficient network usage, we did not sacrifice our commitment to the continued realization of universal service. We repeatedly voiced our concerns about residential subscribers and took steps to protect universal service.[14]

Universal service as a practical matter does not mean that every single household in the United States has telephone service. Census statistics and experience under the system of widespread subsidies now in place suggest that one hundred percent penetration may be an ideal, but it is unlikely to be attained in practice.[15] The Bureau of the Census in the U.S. Department of Commerce collects data that measure telephone penetration and that can be used to determine the percentage of households with telephone service. Summarized in Attachment 2 are data showing the percentage of households in each state and the District of Columbia with telephone service. The percentage figures from the 1980 Census range from a low of 83.7 percent for Alaska to a high of 97.0 percent for Wisconsin. For the United States as a whole, 92.9 percent of the households had telephone service in 1980. Most of the figures fall in the 90–95 percent range. It should be noted, however, that less than 90 percent of the households had telephone service in fourteen states. Before the decisions highlighted in the Michigan petition were taken, many residential subscribers, for whatever reason, lived without telephone service in their homes.

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[13] 47 U.S.C. §151.

[14] For example, we stated about access charges: "We are well aware that the plan we adopt today constitutes a significant departure from interstate policy approaches developed in a monopoly environment. We are totally committed to insure that this approach does not lead to a disruption of our nation's telecommunications system or to the elimination of universal service. That commitment is reflected in our decision to exclude Universal Service Fund costs from end user charges before and after the transition periods . . . . " Access Charge Order, at para. 195.

[15] As we noted in the Access Charge Order, at para. 80. "the term 'universal service' has rarely been defined. Most participants apparently agree that 'universal service' has existed on a nationwide basis for several years. In the context of this proceeding a 'universal service objective' means avoiding actions that would cause a significant number of local exchange service subscribers to cancel that service."

Much information has been accumulated in this proceeding. None of it indicates a threat to "universal service." We firmly believe that the American public will benefit from our decisions. While we have taken many steps to minimize any negative results of our actions, we recognize that some individuals will experience somewhat higher telephone service charges in the short term as we pursue efficient, widely-available telecommunications service.[16] Exactly what effect of our decisions will have on various subscribers must be monitored. We are committed to doing this.[17]

The remainder of this report has four sections (1) overview of pending rate cases and their causes; (2) detailed analysis of the rate effects of our decisions and the AT&T divestiture; (3) effects of rate changes on telephone demand; and (4) need for monitoring.

II. *OVERVIEW OF PENDING RATE CASES AND THEIR CAUSES*

Because of the major changes in the telecommunications industry caused by our decisions and the AT&T divestiture, there is widespread concern about rate changes and their effects on the proportion of households subscribing to local exchange service. Forecasts of telephone penetration depend on estimated residential local rates.[18] In this section, we provide an overview of pending and recently-decided state rate cases. The next section examines these rate cases in more detail. This information shows that predictions of huge local residential rate increases caused by these decisions are unsubstantiated.

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[16] One observer has noted noted:

> Moving beyond the current controversies, we should remember that our dilemma has been brought on by our good fortune. The new technologies responsible for the transformation of the industry are, overall, cutting the cost of transmitting information dramatically and stimulating a badly needed increase in the nation's productivity. Like the robot welders on GM's assembly lines, the new telecommunications technologies will benefit society as a whole. But not everyone will be better off - and that is why problems arise.

Johnson, Leland, "Why Local Rates are Rising," *Regulation* (July/August 1983) 51.

[17] *See* note 9 *supra.*

[18] See Part IV of this report for a discussion of studies of telephone demand.

Many state commissions and others predicted that our decisions will cause telephone rates to double or triple. These claims are supported only by sketchy evidence or undocumented figures, not reasoned analysis. During the course of this study we have attempted to ascertain the validity of such predictions.

We invited state commissions to provide us with information to substantiate their claims, including data on recent and pending rate proceedings in their states, predictions of future rates, and analyses of the effects of recent FCC decisions and the AT&T divestiture on intrastate rates. In response to our *Notice* we received information from twenty-seven states. Many of the responses were incomplete and required supplemental information from other sources. These data will be discussed in detail in the next section.

In addition, a fairly comprehensive record of major rate cases for 1982 and 1983 was developed by informally requesting information from the BOCs and major independents (GTE, Continental Telephone, United, and Central Telephone). We obtained information from all of these companies; this information is summarized in Attachment 3. This section discusses three principal findings based on our overview of state rate developments.

Finding 1: In almost all cases, revenue requests by exchange telephone companies vastly exceed actual revenue authorizations by state commissions.

Requests for revenue increases are typically significantly larger than awards, especially in general rate cases. There is plentiful data on this point. So far in 1983, state regulatory commissions awarded the BOCs only 39.9%[19] of their total dollar requests; in 1982, the figure was 56.2%[20] According to AT&T, the BOCs were awarded 61% of their intrastate revenue requests in 1981. A weighted average of the BOCs and major independents yields an overall award of 40.2% of requests in 1983, and 54.9% in 1982.[21]

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[19] This percentage based on data from the BOCs' Central Services Organization is higher than a number presented in a letter from William Stump of AT&T to the Chief, Common Carrier Bureau. This newer BOC figure reflects, among other things, revised rate requests. *See* our discussion of the Southwestern Bell rate increase, *infra*. We cannot ascertain whether such changes account for the full differential.

[20] *See* Attachment 3.

[21] *See* Attachment 3. The 1983 calculations are based on the amounts requested and granted in concluded rate cases. These completed cases represented and granted in concluded rate cases. These completed cases represent about one half of the state rate cases reported so far in 1983. The amounts requested in pending rate proceedings are not included in the calculations. Pending rate cases are being

The reasons for the discrepancy between awards and requests are manifold. They vary from state to state because of each state's regulatory policies and history. The main issues include the cost of capital to the firm; depreciation practices and equipment life; composition of the rate base and allowable expenses; determination of test year periods, measurements and projections (including future demand); relations among affiliated corporate entities, particularly contracts with and purchases from manufacturing subsidiaries; taxes; and previously disallowed and resubmitted items.[22]

Many state commissions answered our request for estimates of future rate increases by translating all of an exchange company's unreviewed request into rate increases. The record we have compiled on recent rate cases clearly demonstrates that such predictions vastly exceed probable future rate changes.

Finding 2: The bulk of the revenue requests by exchange telephone companies are linked to factors other than the federal decisions highlighted by the Michigan Petition.

The BOCs have pending requests in thirty-two jurisdictions for an aggregate amount of $6,705.7 million.[23] To estimate the portion of pending BOC revenue requests that could be attributed to the decisions highlighted by the Michigan Petition, we selected BOCs in a sample of seven states. The states chosen—Kansas, Minnesota, Missouri, New York, Ohio (Ohio Bell), Oklahoma, and Texas—afforded the easiest comparisons. The BOC request in each of these states is filed on a divested basis, as a general rate case for over $100 million, and includes a request for capital recovery. Each BOC in these states filed a prior rate case within the past two years, so the current request represents changes in the revenue requirement since that time. Furthermore, depreciation represcription and

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decided on an ongoing basis. The December 8 *Wall Street Journal* (p.3) reports that the California PUC granted Pacific Telephone $446 million of a requested $838 million, raising allowed revenues by about 5.7%. These recent grants are consistent with our findings.

[22] For a detailed discussion of the factors that commonly affect rate proceedings, *see* Garfield and Lovejoy, *Public Utility Economics* Ch. 5–9 (1964).

[23] This figure becomes $9,844.1 million if intrastate carrier access charges (CAC) of $3,138.4 million are included. For comparability purposes we modified the pending requests by subtracting intrastate carrier access charges (CAC) where these were included. Carrier access charges are costs charged exclusively to the interLATA carriers by the exchange carriers for use of the local network. The costs are reflected in the price of toll service charged by the interLATA carriers to their customers in the form of usage charges. These do not necessarily represent a change in revenue requirements, but rather a change in the method of charging for these costs. We cannot determine precisely to what extent these newly-filed charges represent an increase over the cost of equivalent services provided in the past. Because they represent in large part merely an intermediation of toll charges, we subtracted them from the aggregate request. As a result, the only access charges included were customer (end-user) access charges (CALC).

changes in methodology were ordered for each sampled company in 1983 and are therefore reflected in each company's pending rate case.

For each of the seven cases, we estimated the incremental impact on 1984 revenue requirement over 1982 revenue requirement attributable to the following factors: (a) depreciation of non-CPE plant and equipment (including both represcription and change in method); (b) changes in the expensing and capitalization of station connections; (c) loss of interstate CPE revenue; (d) intrastate customer access line charges (CALC), if these have been included in the pending request;[24] (e) divestiture (network reconfiguration and equal access); and (f) cost separation changes. Divestiture, of course, is not an FCC decision. Depreciation represcription (which is a significant part of total depreciation expense) and cost separation changes are decisions made jointly by the FCC and state representatives.

The results of our comparison are displayed in Columns I and II of Attachment 4. The portion of these pending rate requests attributable to the decisions listed above varies from 13% for Southwestern Bell (Oklahoma) to 51% for Northwestern Bell (Minnesota). The weighted average attributable to these decisions for all seven jurisdictions is 38%. This sample indicates that most of the pending revenue requests and rate increases granted are not caused by the decisions cited in the Michigan Petition. This conclusion is confirmed by additional analysis presented in the next section.

Other factors, including rate of return, non-depreciation operating expenses,[25] and rate base valuation, are primarily responsible for the pending rate increases. Inflation has a significant impact on all these factors. Wages, salaries, and maintenance costs are especially sensitive to economy-wide inflationary trends. In 1981, BOC maintenance expenses, operators' wages, and general office salaries and expenses totalled $17,701,351 of the $29,749,886 in non-depreciation operating expenses allowed by state commissions, or 59.6%. In addition, inflation can affect the cost of capital to utilities, the cost of replacing plant and equipment that is no longer useful, and the cost of facility expansions. Besides inflation, modernization of operations to implement new technologies may result in obsolescent plant, requiring represcribed depreciation rates and a significant increase in annual depreciation expenses. Historically and regardless of changes in depreciation methods instituted by this Commission, these pressures have resulted in making depreciation a very high portion of telephone company expenses. For instance in 1981, they totalled $7,490 million for the BOCs, or 20.1% of their total operating expenses.[26] Given the pace of technological change, these trends most likely will continue.

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[24] We have included intrastate customer access charges even though we did not mandate them.

[25] Telecommunications utility accounting includes depreciation as a portion of operating expenses. *See* Garfield and Lovejoy, *supra*, at 46.

Southwestern Bell's pending Texas rate case illustrates observations made so far in this section. Of its revised (September 30, 1983) request for $1,360.0 million, $669.0 million represent carrier access charges. Subtracting this amount from the total request leaves $691.0 million in the request for higher customer charges. Of this amount an estimated $72.8 million is due to represcribed plant lives and salvage value and FCC-mandated changes in depreciation methods (adoption of remaining life and equal-life-group methods); $93.5 million is due to changes in the expensing and capitalization of station connections; $23.9 million is due to loss of interstate CPE revenue; $119.4 million is due to intrastate customer access line charges; $5.9 million is due to divestiture; and a net decrease in intrastate revenue requirements of $6.4 million is due to cost separation changes. Hence, of the $691.0 million requested, $305.9 million or 44% can be attributed to the highlighted decisions. The remainder of $385.1 million presumably represents a request for rate-of-return improvement, wages, and other items.

Finding 3: The decisions identified by the Michigan Petition will not cause sharply higher minimum charges for obtaining residential service.

To ascertain the impact of revenue authorizations on residential rates, we focused on the amount of authorized revenue requirement allocated to basic residential exchange service and, in particular, the basic portion of residential rates.[27] We examined this allocation in the past and estimated the amount of pending residential exchange service revenue needs caused by the highlighted decisions.

The BOCs provided us with data shown in Attachment 3 on the portion of authorized requests for 1982 and 1983 to be derived from basic residential exchange rates. The amount of intrastate revenue increases allocated to basic residential rates is small. In 1983, the BOCs' revenues from basic residential rates increased by $205 million, 13% of the $1,552 million in revenues awarded. Similarly in 1982, the BOCs' residential basic-rate revenues increased by $519 million, 21% of the $2,431 million revenue awarded. Most of the rate increases is allocated to other intrastate services.

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[26] Federal Communications Commission, *Statistics of Communications Common Carriers 1981*, Table 16, p.30.

[27] The basic portion of residential rates plus interstate and intrastate access charges represent the minimum cost of subscribing to telephone service. Unlike usage charges, the subscriber cannot cut back the basic rate of telephone charges without foregoing service entirely. It is important to emphasize, however, that the average subscriber and probably most subscribers voluntarily pay for more service than they would if they exercised their option to choose telephone service at the basic rate. Compare Attachment 14 and Table 1, p. 18 with Attachment 5. Attachment 5 includes data submitted by AT&T showing current single-party residential rates for the BOCs by state, with a breakdown of flat and usage charges. Upon implementation of our access plan, $2 monthly in interstate CALC will be added to these flat charges in 1984.

For pending rate cases, the amount requested for basic residential rates accounts for over half of the overall revenue request. Without intrastate CALC, the basic residential portion of the BOCs' revenue request is $3,271.0 million of the $5,875.5 million in pending requests, or 56%. We have not, been able to obtain accurate figures for the residential portion of the BOCs requests for intrastate CALCs. However, including these figures would not result in a significant difference in the 56% figure calculated here.

We calculated the impact of the highlighted decisions on basic residential charges for the pending rate cases in the seven sample states. The results are displayed in Columns III and IV of Attachment 4. The portion of the requested higher flat residential rates which can be attributed to these decisions varies from 1% in Oklahoma to 31% in New York. The weighted average for all seven states is 12%.[28]

We cannot confidently predict future allocations that state commissions will actually make. Because state commissions exercise their discretion to oversee tariffs in a variety of ways, there is no direct relationship between authorized revenue increases and increases in the rates of particular services. General revenue increases have not as a rule resulted in across-the-board rate increases for all services; nor has the increased cost of providing a particular service necessarily resulted in increases in its rates. Each state has discretion in determining intrastate residential flat and usage rates.[29] Each state is free to develop its own method of allocating costs among various service offerings, and to apply various pricing mechanisms such as above-cost "value-of-service" pricing, competitive usage-sensitive pricing, and flat-rate pricing to the various intrastate services.

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[28] There is no FCC decision that determines how much of the intrastate revenue requirement must be recovered through basic charges. This determination is at the discretion of each state. Some companies may try to increase their revenues from basic residential charges. The small percentage of 1982 and 1983 awards that states have assigned to basic residential charges show that the states have not generally taken this course. We have received no evidence demonstrating a sharp change in states' practices in this regard beyond the intrastate CALC.

[29] Southern Bell gave us an example of how rates are set in Florida. According to Southern Bell, the current method of intrastate revenue allocation among the various service offered is as follows: First, supplemental services (*e.g.*, custom calling) were priced at "value of service" so as to make a contribution to common costs. Next local channel services (*e.g.*, local private line) was priced below cost. Service charges (*e.g.*, telephone installation) were priced to make a contribution. Next interexchange service rates (including MTS/WATS and private line) were assigned and these provided a significant contribution to common costs. Finally, other local exchange service rates (*e.g.*, suspension of service charges) were assigned, leaving as a residual, local exchange service. This residual "pot" was assigned to various rate groups (based on the size of the local exchange) and applied to various basic exchange services using customary "rules of thumb" (*i.e.*, 2:1 ratio between business and residential rates and a 2.2:1 ratio between PBX trunks and single business lines).

In conclusion, it is highly unlikely that the large pending rate requests will be granted in full. The decisions identified by the Michigan Petition will not be the cause of most of the rate increases. Further, the extent to which revenue requirement changes are covered by higher residential rates is within the states' discretion, and it is unlikely that most of the rate increases will take the form of higher flat residential rates.

III. *DETAILED ANALYSIS OF THE RATE EFFECTS OF FCC DECISIONS AND AT&T DIVESTITURE*

Responses By States To Data Requests

The overview presented in the preceding section used data obtained from large exchange telephone companies and FCC staff estimates to analyze the effects on residential exchange service rates of the decisions highlighted by Michigan. Unfortunately, the information received from state commissions was not complete and supported sufficiently to provide a basis for drawing broad firm conclusions. In this section we present the information supplied by state commissions as well as more detailed analysis by the FCC staff.

In response to the Michigan Petition, we requested state commissions to provide us with at least the following data:

1. A list of the amounts requested in all pending telephone rate cases by company, the portion of each which is allocated to (or proposed to be raised from) basic residential exchange service, the current average residential rate and the proposed new average residential rate, the number of subscribers affected by each company's proposed basic residential service rate change, and a brief summary of the reasons for the increases and the proportion of each increase attributable to each reason. The FCC decisions cited by Michigan should be given particular attention in the responses. Information on new developments in rate structure (e.g., measured services) which provide alternatives to flat rate unlimited service also would aid our analysis.

2. The dollar amounts of all rate increases filed in the past two years, the total amounts granted, and the portion recovered from basic residential local exchange service.

3. Any documented evidence of actual subscriber drop-offs due to past rate increases, and particularly those due to the change in depreciation rates.

4. Copies of all estimates and studies of potential subscriber disconnects or demand elasticities, including supporting data sufficient to explain the estimates and the bases for the estimates. The names of the authors of the study and the sponsor should be identified (i.e., consultant, carrier).

5. The number and percentage rate of net disconnects, if any, which the states estimate would occur due to expected rate increases in each of the next three years. If possible these should be broken down by urban and rural. A statement clearly explaining assumptions and method of analysis for the estimates of

disconnects and rate changes should also be provided including the amounts and causes of the projected rate increases.

The respondents are geographically dispersed and include both highly populated, industrial states as well as less populated, non-industrial states. The information and data contained in the reports vary from state to state. All the commissions that reported to us included data on pending and past rate cases, but some did not provide the other information and data we requested. Attachment 6 shows this information on past rate cases; in most cases, there was a substantial differential between the amounts requested and awarded.

For most of the pending rate cases, shown in Attachment 7, the state commissions apparently were unable to identify either the dollar amount or the percentage of the rate requests that are attributable to the cited decisions. When the causes of the rate requests were quantified, sources other than these decisions account for most of the requests. For example, the Michigan Public Service Commission includes data indicating that at least 59.1% of a recent rate increase requested by Michigan Bell is attributable to sources other than these decisions (MPSC Petition, Att. 2). These sources include rate of return increases, growth in plant, wage increases, and operating cost increases.

An even smaller number of state commissions submitted estimates of the increases in basic exchange service rates that they expect to result from these decisions. Only four state commissions—Arizona, Michigan, New York, and Vermont—included estimates for each of these decisions. Other state commissions, such as Kansas and New Jersey, submitted estimates for only some decisions. These estimates are shown in Attachment 8.

It is not certain whether the past pattern of granting a smaller rate increase than requested will continue in the future. As previously noted, it is difficult to predict what actions states will take in response to the changing conditions in the industry. Recent actions of state commissions do tend to follow historical patterns. For example, the Michigan Public Service Commission recently granted Michigan Bell a rate increase that was substantially below the company's original request. In its report, the state commission listed a pending rate case involving Michigan Bell in which the company requested a revenue increase of $451 million. The state commission estimated that if it granted the request in its entirety, Michigan Bell would realize $508.8 million in increased revenues, not the $451 million figure projected by the company. The increase consisted of an historical revenue deficiency ($55.4 million), increased depreciation ($162.1 million), expensing station connections ($33.3 million), separations changes ($7.1 million), independent company settlements-station connections ($5.4 million), increased rate of return ($151.6 million), demand suppression ($61.3 million), increased plant ($21.8

million), and increased operating costs ($11.8 million). The case was settled for a rate increase of $182.5 million, pending the outcome on appeal of the FCC's decision in CC Docket No. 79–105 preempting states from setting depreciation rates different from those prescribed by the Commission.[30] As part of the settlement agreement, the state commission staff estimates that Michigan Bell was granted a $39 million increase in depreciation, of which $23 million covers amortization of reserve deficiency and the remaining $16 million is the result of FCC decisions.

We received only limited evidence of changes in telephone subscribership due to past rate increases and even fewer estimates of potential subscriber discontinuance from responding state commissions. Several state commissions included price elasticity information in their reports. These studies are discussed in the next section. To our disappointment, much of the data necessary for our analysis apparently are not available at the state commissions which filed responses in this proceeding.

While our information on the reasons behind state rate requests is limited, the available information indicates that most of the requests are attributed to increased operating costs such as the cost of capital, wages, and growth in plant, rather than the decisions highlighted in the Michigan Petition. We are confident that the state commissions involved in pending rate cases will scrutinize the requests closely.

Only a handful of the state responding to our Notice provided estimates of the impact of the cited decisions on local rates. Few, if any, of these estimates were documented. The Michigan Public Service Commission for example, has a single page summarizing the estimated impact of various federal actions on monthly basic residential rates in 1984. The estimated increase ranges from $9.13 to $12.28.[31] However, the assumptions, information, data, and methodology used to develop these estimates are not described in the state commission's submission.[32]

Because of the lack of data in the state commission submissions and our obligation to provide some estimates of the impact of our actions, we have attempted to produce some detailed estimates of the revenue impact of various decisions based on data that we have collected from multiple sources. We have made such estimates in the past in the context of our proceedings,[33] but this is the first time we have compiled estimates on so many decisions in a single place.

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[30] *See* note 1, *supra.*

[31] *See* Attachment 8. As an example of the variation in estimates on these matters, Michigan Bell calculates the effect of these decisions to be $0.97.

[32] We also reviewed the testimony of Eric J. Schneidewind, Chairman of the Michigan State Public Service Commission, presented to the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce (March 22, 1983), for an explanation of estimated impact of these decisions. Mr. Schneidewind presented a set of estimates that is identical to the one contained in the state commission's report. Unfortunately, his testimony and the accompanying appendix do not describe the methods or data used to calculate the estimates presented.

FCC Staff Analysis of the Effect of Federal Decisions

In addition to the submissions received in response to the Notice, the staff conducted an independent analysis of the changes mandated by the decisions in question. The primary objective in conducting the analysis was to estimate the relative impact of these changes on residential exchange rates and, thus, assess the potential threat to universal service. The principle changes considered were new depreciation procedures, accounting for station connections, the detariffing of CPE, divestiture and equal access, proposed separations changes, implementation of interstate and intrastate access charges, and the general increase in toll activity. The study estimated the potential monthly increases or decreases in residential exchange revenue requirements of fifty-two BOC separations study areas[34] for the years 1981 through 1989. Cumulative changes in monthly revenue requirements attributable to these changes were estimated for each year relative to 1980. The study did *not* attempt to quantify subscribers' significant savings from reduction in toll rates, which are sure to occur.

The full study consists of over 500 pages of data addressing the measurement of over seventeen discrete changes in the fifty-two jurisdictions.[35] Nine years of summarized results showing the impact on residential exchange customers for the Bell System are contained in Attachment 12. Obviously, in the short time since the study was completed there has not been sufficient time to analyze in depth each impact, or to identify the specific underlying causes for each increase, much less the underlying causes of specific variations between jurisdictions. Nevertheless, several general observations and conclusions can be made at this time.

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[33] *See* FCC Public Notice released January 21, 1982. This Notice listed the effects on interstate and intrastate revenue requirements for 1981, 1982 and 1983 for AT&T and GTE caused by six FCC decisions, four of which related to depreciation.

[34] A study area is the area of operations of a telephone company within a single state. Because the Bell System does not serve Alaska or Hawaii, comparable data was not immediately available and, as a result, estimates have not been made for these states.

[35] The full set of results and a copy of the computer program used to generate these figures are available for inspection at the Commission's offices.

Estimated Cumulative Impact on Average Residential Bills Through 1989 as a Result of Changes Reflected in FCC Study

Jurisdiction	*1981 Average Bills*[1]	*Average Additional Revenue Requirement Through 1989*[2]	*1989 Average Bill*
South Central Bell - Alabama	$14.61	$6.62	$21.23
Mountain Bell - Arizona	12.01	8.84	20.85
Southwestern Bell - Arkansas	15.65	5.66	21.31
Pacific Telephone (California)	9.91	13.95	23.86
Mountain Bell - Colorado	10.90	8.71	19.61
Southern New England (Connecticut)	13.51	6.01	19.52
Diamond State (Delaware)	11.02	4.49	15.51
Chesapeake & Potomac (District of Columbia)	12.85	2.75	15.60
Southern Bell - Florida	14.87	8.33	23.20
Southern Bell - Georgia	14.66	6.68	21.34
Mountain Bell - Idaho	11.82	10.07	21.89
Pacific Northwest Bell - Idaho	N/A	9.33	N/A
Illinois Bell	17.44	.51	17.95
Indiana Bell	13.79	4.49	18.28
Northwestern Bell - Iowa	12.99	4.14	17.13
Southwestern Bell - Kansas	11.28	7.79	19.07
Cincinnati Bell - Kentucky	N/A	3.90	N/A
South Central Bell - Kentucky	15.30	6.42	21.72
South Central Bell - Louisiana	16.19	8.13	24.32
New England Telephone - Maine	10.89	7.03	17.92
Chesapeake & Potomac - Maryland	13.80	2.99	16.79
New England Telephone - Massachusetts	14.70	2.96	17.66
Michigan Bell	13.92	7.03	20.95
Northwestern Bell - Minnesota	12.85	4.37	17.22
South Central Bell - Mississippi	15.84	6.19	22.03
Southwestern Bell - Missouri	11.75	4.19	15.94
Mountain Bell - Montana	8.78	14.78	23.56
Northwestern Bell - Nebraska	12.82	6.78	19.60
Bell of Nevada	11.68	13.69	25.37
New England Telephone - New Hampshire	12.48	9.42	21.90
New Jersey Bell	11.20	8.01	19.21
Mountain Bell - New Mexico	$11.42	$9.15	$20.57
New York Telephone	21.83	3.63	25.46
Southwestern Bell - North Carolina	11.72	9.88	21.60
Northwestern Bell - North Dakota	12.97	9.73	22.70
Cincinnati Bell - Ohio	N/A	2.39	N/A
Ohio Bell	14.46	4.79	19.25
Southwestern Bell - Oklahoma	9.72	9.07	18.79
Pacific Northwest Bell - Oregon	10.51	7.04	17.55
Bell of Pennsylvania	9.91	4.03	13.94
New England Telephone - Rhode Island	14.09	2.18	16.27
Southern Bell - South Carolina	14.88	7.11	21.99
Northwestern Bell - South Dakota	11.18	9.85	21.03
South Central Bell - Tennessee	14.77	6.42	21.19
Southwestern Bell - Texas	13.70	7.38	21.08
Mountain Bell - Utah	11.61	5.05	16.66
New England Telephone - Vermont	11.01	12.76	23.77
Chesapeake & Potomac - Virginia	13.19	5.18	19.00

Jurisdiction	*1981 Average Bills*[1]	*Average Additional Revenue Requirement Through 1989*[2]	*1989 Average Bill*
Pacific Northwest Bell - Washington	10.59	6.10	16.69
Chesapeake & Potomac - West Virginia	17.52	7.10	24.62
Wisconsin Telephone	12.59	5.58	18.17
Mountain Bell - Wyoming	9.84	15.51	25.35
Bell Systems Total	13.76	6.80	20.56[3]

[1] Figures provided by AT&T for first quarter 1981. Includes local service, local message charge, and CPE; excludes taxes, billed toll and other charges.

[2] Results of Staff Study, Attachment 11 (excludes CPE). Attachment 10 shows results if CPE is included.

[3] The Bell System Totals are weighted arithmetic averages.

N/A = Not Available.

[Note that 1981 figures are average bills, not basic residential exchange service rates. See Attachment 5.]

The study shows that there was very little impact as a result of these changes from 1981 through 1983. Using conservative assumptions, the cumulative effect over these three years was only $0.41 per month. However, by 1984 the cumulative monthly increase is $4.22 and it gradually grows to $8.28 by 1989. This represents a compound growth rate of about 7% from 1983 through 1989, based upon 1983 residential telephone exchange bills. The estimated increases by year are shown in Attachment 10.

The estimates in Attachment 10 almost certainly overstate costs to consumers. They assume that residential subscribers will continue to cover the CPE revenue requirement after detariffing and that each study area would implement intrastate business and residence end-user access charges. In comparison with the figures in Attachment 11, the higher amounts listed in Attachment 10 are calculated as if customers were obtaining their equipment on a continuing lease basis, as they are today if they rent from the telephone company. However, consumers will begin saving money in a matter of months after they buy equipment, once the cost of buying their equipment is exceeded by the accumulated monthly charges otherwise they would have paid. Such savings are not reflected in our estimates.

If we assume, however, that users choose to avoid the continued CPE revenue requirement, the average cumulative increase resulting from all policy changes covered by this study amounts to only $6.80 per month by 1989, which reflects a compound growth rate of 6 percent per year. Attachment 11 contains the same cumulative increase for each year shown in Table 1 but excludes the continuing CPE revenue requirements. It is interesting to note that from 1981 through 1983, a period when our decisions had a nominal effect, average residential exchange bills increased at an annual rate of about 10 percent. Judging from our experience, these increases would be attributable primarily to the effects of inflation on rates of return, wages, and the cost of new equipment. The rate of inflation has been lower recently, and it will not significantly affect rates as long as it does not increase.

Inasmuch as the interstate end-user access charge is to be initiated in 1984, and fully implemented in 1989, the study results for those years are most pertinent for assessing the universal service implications of the study. The major changes in average monthly revenue requirements are as follows:

	1984	*1989*
Depreciation	$ .70	$ .33
Station Connections	−.35	.85
CPE Decisions	.99	.88
Separations Changes	.20	1.27
Shift toward toll services	−.59	−2.29
Interstate Access	2.00	5.11
State Access	1.27	3.97
Other	.00	−.14
Total	$4.22	$8.28
Total Net of CPE Changes		6.80

Changes in depreciation, separations, toll network access, and the deregulation of CPE have increased estimated revenue requirements. These increases have been significantly offset by the shift of station connections revenue requirements to the cost-causative ratepayer and an estimated faster growth in toll services as related to all services. In addition, states may or may not decide to impose flat rate and user access charges. The change in average monthly revenue requirements estimates above would be reduced by $3.97 in 1989 if no intrastate CALC is imposed. However, it is likely that any savings in intrastate toll rates due to the change would be foregone.

In order to evaluate the increases in basic residential exchange service bills, we added the cumulative increases from the staff study to the basic monthly bills incurred during the first quarter of 1981. This is shown in Table 1. Our analysis of the cumulative impact on basic bills due to the studied changes shows that all of the jurisdictions are within $5.00 of the 1989 system average of $20.56.

It is interesting to note that many of the jurisdictions heavily affected by the studied changes were in the lowest range of basic rates at the beginning of the study period. For example, in Montana we find a 1981 basic bill of $8.78 and a $14.78 increase due to studied changes. This yields a $23.56 cumulative total. Montana's $8.78 basic bill was the lowest rate shown, and Montana experiences the fifth highest estimated increase. In contrast, New York had the highest average exchange billing of $21.83 in 1981. It will experience an increase of $3.63 due to the studied changes. This yields a cumulative total of $25.46 for New York.

We find that significant differences in estimated increases exist for some states, depending upon the degree of urbanization, age of plant, rate of growth, and proportion of telephone activity devoted to toll services. The results of the staff study indicate that those states having a high degree of population concentration, low rates of growth, low embedded plant cost, and relatively low toll activity are least affected by the studied factors. Illinois is a good example of such a state.

Illinois residential exchange revenue requirements are least affected by the changes incorporated into the analysis. This appears to be primarily attributable to the fact that most of the activity in that state is related to state toll and exchange services in combination with low embedded costs. Revenue requirement increases per residential access line for Illinois are estimated to be $.80 in 1981, $2.88 by 1984, and $.51 by 1989. This is the lowest level of estimated 1989 increase found in the analysis for any of the study areas.

Wyoming, on the other hand, is very sensitive to the proposed changes. It appears to be a state with high costs, the preponderance of which are presently allocated to the interstate jurisdiction. About 56% of Wyoming's revenue requirements were related to interstate toll activity in July 1983. The combination of high costs and reduction in the interstate subscriber plant factor (SPF) results in large estimated increases in revenue requirements for that state. Its estimated revenue requirements decreased $.12 in 1981, would increase to $4.69 by 1984, and $15.51 by 1989. Had it not been for the benefit of the high cost factor adopted by the FCC in the jurisdictional separations process, Wyoming's estimated increase through 1989 would have been $11.26 higher.

It must be emphasized that the method of analysis used to arrive at these estimates represents a conservative approach with maximum impact on residential exchange revenue requirements using historical separations principles and practices. Estimates of increases in residential exchange revenue requirements include the following elements, some of which may be avoided by the end-user and/or redistributed by state action:

1) Revenue requirements associated with CPE deregulation have been assumed to be a continuing burden to the end-user under the results in Attachment 10. The end-user may avoid or reduce revenue requirements by obtaining CPE from alternative sources. This result is shown in Attachment 11 and in Table 1.

2) In the analysis, part of the reduction in regulated CPE revenue requirements as a consequence of deregulation has been distributed to intrastate toll.[36] State

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[36] Attachment 13 shows the distribution of changes among service categories for the Bell System in 1989.

regulators could shift this benefit to reduce residential exchange revenue requirements.

3) The revenue requirements transferred to the interstate jurisdiction through the high cost factor have been distributed as a reduction in revenue requirements attributable to exchange services. Again, state regulators could shift this entire benefit or part of it to residential exchange revenue requirements.

4) Revenue requirements recovered from intrastate end-user access charges are assumed to be offset by a reduction in intrastate toll usage revenue requirements. Within certain limits (e.g., a disparity between inter- and intra-state rates for identical mileage bands which is not excessive) the intrastate end-user access charge revenue requirements could be determined in such a manner that residential exchange revenue requirements would not be increased as sharply at the staff analysis shows. States, however, do have the option of assessing intrastate access charges or continuing to allow their local companies to be compensated for NTS plant by intrastate toll usage charges. If they adopt access charges, there will be a corresponding reduction in intrastate toll rates which we have not quantified here.

These examples show that state regulators have flexibility in distributing revenue requirements among service offerings in order to reduce the potential impact on residential exchange revenue requirements described in the staff study. Many alternatives for distributing revenue requirements exist beyond those in the staff analysis. We also believe that the effects of some of the changes in residential exchange revenue requirements can be further mitigated be state Commissions through their treatment of the benefits of our new policies, such as the high cost factor. While revenue requirements will increase in the future, the staff analysis shows that the effects are not, on the whole, nearly as large as commonly thought. Furthermore, none of the estimates contained in the staff analysis includes any of the benefits of reduced toll rates as a result of access charges. These reductions in toll rates will also be passed on to rate payers. Considering that, system-wide, customers pay higher toll charges than basic rate charges (see Attachment 14), the significance of toll reductions cannot be gainsaid.

IV. EFFECTS OF RATE CHANGES ON TELEPHONE DEMAND

The rate effects of our decisions are small when compared to the predictions of doubling and tripling rates. The fundamental question, of course, is whether rate increases will cause a significant number of residential users to discontinue service. In this section, we examine information on subscriber responses to price changes through the available economic studies and data on actual subscriber discontinuances. We arrive at the following finding:

Finding 4: There is no evidence that federal decisions highlighted by the Michigan Petition will cause residential subscribers to discontinue service, and thus threaten universal telephone service.

Economic Studies

Numerous studies attempt to assess the impact of rate changes on telephone demand. Before discussing the individual studies, it is important to understand the concept of demand elasticity. The price elasticity of demand is a commonly used measure of the effects of price changes on demand.[37] This elasticity is defined as the percentage change in quantity demanded caused by a one percent change in price, other factors remaining constant. Since consumers generally react to price increases by decreasing the quantity demanded, these elasticities are generally negative.

An elasticity of between zero and minus one indicates that the quantity demanded changes by a smaller percentage than the price change. For example, an elasticity of -0.1 means that a price increase of one percent will result in a decrease of quantity demanded of one-tenth of 1 percent or a price increase of 10 percent will result in a decrease in quantity of demanded 1 percent. An elasticity of zero indicates that there is no change in the quantity demanded as a result of the price change.

One other consideration is the duration of the demand response. A short-run elasticity measures the response that occurs during the same period as the price changes. A long-run elasticity measures the total response that occurs in all periods. Sometimes an intermediate-run elasticity, measuring the response over the first few time periods, is quoted.

Many demand studies were submitted in this docket. Some of them developed elasticity estimates for various services. Other submissions contained surveys of the literature concerning telephone demand. The studies indicate that for most telephone services, demand tends to be inelastic. In other words, there must be a substantial increase in the price of service before any appreciable decrease in demand occurs. However, there is a great amount of variation in the degree of inelasticity among services. We focus on the demand for access (connection to the network or basic exchange service) because for purposes of assessing possible threats to universal service, that is the relevant component of the demand for telephone services.

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[37] Other measures are used to relate changes in demand to changes in other factors. For example, "income elasticity" of demand relates changes in income to changes in demand.

The major studies submitted to us in this docket include ones by Bruce Egan,[38] Noel Doherty,[39] Michael Carr,[40] Data Resources,[41] Gail Gearity,[42] Lewis Perl,[43] Richard Reinking,[44] Charles River Associates,[45] Richard Oveson,[46] Laurits Christensen[47] and Richard Miller.[48] Each uses regression analysis to estimate the impact of various factors on the demand for telephone services. In addition, Gary Bowman and Wayne Morra's[49] extensive survey of the literature of telephone demand studies was submitted. Some less extensive literature surveys were included with some of the other studies. of these studies

These studies vary in scope and analytical complexity. The Oveson study was a simple regression of demand on income, and thus did not include a price elasticity estimate. The Reinking study is a simple regression of access demand on price, which is of limited value since it fails to take into account the effects of other factors such as income. The Charles River Associates study does not estimate the elasticity of access, but instead looks at the substitution among different grades of service. Because the Perl study has been cited by several states in their submissions in this docket, an extensive analysis of it is given in Attachment 15. The attachment also discusses a new study by Perl, based on more recent data and using better methodology. Perl's studies use a nationwide cross-section of responses of individuals to a survey. The other studies are all based on time-series data of one company's operations. The Egan study involves a pooling of cross-section and time-series data, with the cross-section being the different states in which Southwestern Bell operates. (For a given time period, each state is one observation.) The Christensen study does not include an estimate of the elasticity of access demand, but this gap was filled by Miller.

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[38] Bruce L. Egan, Testimony Before the Arkansas Public Service Commission, and Testimony before the Public Service Commission, State of Missouri, submitted by Southwestern Bell.

[39] A. Noel Doherty, Testimony Before the Public Service Commission of the State of New York, on behalf of New York Telephone, submitted by the New York Department of Public Services.

[40] Michael T. Carr, Testimony Before the Public Service Commission of the State of New York, on behalf of Rochester Telephone, submitted by the New York Department of Public Services.

[41] Data Resources, Inc., "Critique of Service Demand and Cost Models Developed by the Southern New England Telephone Company," submitted by the State of Connecticut Department of Public Utility Control.

[42] Gail A. Gearity, Testimony Before the Tennessee Public Service Commission, on behalf of United Inter-Mountain Telephone Company, submitted by the Tennessee Public Service Commission; Gail A. Gearity, Testimony Before the Virginia State Corporation Commission, on behalf of United Inter-Mountain Telephone Company, submitted by the Virginia Public Service Commission.

[43] Lewis J. Perl, "The Pacific Telephone and Telegraph Company Intrastate Access Charge Application," Testimony Before the State of California Public Utilities Commission; Lewis J. Perl, "Economic and Demographic Determinations of Residential Demand for Basic Telephone Service", National Economic Research Associates, Inc., March 28, 1978.

[44] Richard D. Reinking, "Access Price Elasticity," submitted by the Arizona Corporation Commission, Appendix E, pp. 16–17, as part of the material supplied by Mountain Bell.

[45] Charles River Associates, "The Demand for Local Telephone Services Upon the Introduction of Optional Local Measured Service (LMS)," prepared for Southern New England Telephone, submitted by the State of Connecticut Department of Public Utility Control.

[46] Richard M. Oveson, "Telephone Usage in Utah: A Consideration of Alternative Offerings," submitted by Mountain Bell, Northwestern Bell, and Pacific Northwest Bell.

[47] Laurits R. Christensen, Direct Testimony on Behalf of Michigan Bell Telephone Company, Before the Michigan Public Service Commission.

[48] Richard C. Miller, Direct Testimony on Behalf of Michigan Bell Telephone Company, Before the Michigan Public Service Commission.

[49] Gary W. Bowman and Wayne A. Morra, "Demand for Access and Use of the Telephone Network: A Critical Review of Literature", Report for GTE Service Corp., submitted by the Iowa State Commerce Commission.

Table 2 summarizes the estimates of the price elasticity of demand for telephone access. It includes all the studies submitted in this docket plus a few others that are mentioned in the literature surveys. The additional studies are by Alleman,[50] Feldman,[51] Davis *et al.*,[52] Mahan,[53] and Heidt.[54] Excluded from this table are studies using data from outside the U.S. The Alleman study includes separate estimates for flat rate customers only and combined flat rate and measured service customers. The Alleman, Feldman, and Mahan studies are based on cross-sectional data.

As the information in the table indicates, the elasticity estimates range from 0 to -.24, with most of the estimates falling below -.09. Those studies using the best and most recent data and having the best specified theoretical framework yield estimates at the lower end of this range. They show that an increase in the cost of access is likely to have a small impact on the number of subscribers.

One important limitation of most studies which probably results in excessive price elasticity estimates is that they do not account for the possibility of subscribers switching to a lower grade of service, rather than dropping service altogether, as a result of increased cost of connection. It is interesting to note that the access price elasticity measured by Alleman dropped substantially when measured service

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[50] J.H. Alleman, "The Pricing of Local Telephone Service," U.S. Department of Commerce, Office of Telecommunications, 0T77-14, April 1977.

[51] J. Feldman, "A Preliminary Cross Sectional Analysis of Services," unpublished paper, AT&T, February 1976

[52] B.E. Davis, G. J. Caccappolo, and M.A. Chaudry, "An Econometric Planning Model for American Telephone and Telegraph Company," *Bell Journal of Economics and Management Science*, Vol. 4, No. 1, Spring 1973, pp. 29–56.

[53] Gary P. Mahan, *The Demand for Residential Telephone Service*, 1979 Michigan State University Public Utilities Papers.

[54] P. Heidt, "New England Telephone - Residence Basic Service Demand," unpublished paper, New England Telephone, May 1979.

TABLE 2. ACCESS DEMAND ELASTICITIES

Study	*State (Co.)*	*Customers*	*Elasticity Estimates* *Short Run*	*1 Year*	*Long Run*
Egan	AR,KS,MO,OK,TX (Bell)	Business	−.01	−.03	−.07
Egan	AR,KS,MO,OK,TX (Bell)	Residence	−.01	−.03	−.04
Doherty	NY (Bell)	All	−.04	−.09	−.11
Carr	NY (Rochester)	Business	NA	−.05	NA
Carr	NY (Rochester)	Residence	NA	−.04	NA
DRI	CT (Bell)	Business	−.04	−.13	−.15
DRI	CT (Bell)	Residence	−.03	−.08	−.08
Gearity	TN (United)	All	−.24	−.24	−.24
Gearity	VA (United)	All	−.22	−.22	−.22
Perl	National Survey (1970 data)	Residence	NA	NA	−.09
Perl	National Survey (1980 data)	Residence	NA	NA	−.01
Reinking	UT (Bell)	All	−.04	−.04	−.04
Miller	MI (Bell)	ALL	−.08	−.08	−.08
Alleman	National, Cities	Residence,FR	NA	NA	−.17
Alleman	National, Cities	Residence,FR&MS	NA	NA	−.02
Feldman	National, States	Residence	NA	NA	−.05
Davis et al	Bell System	All	NA	−.02	−.08
Mahan	NC (United)	Residence	NA	NA	0
Heidt	NE Tel. (Bell)	Residence	−.04	NA	−.20

was included in the estimation. This is also the case in the preliminary results of the new Perl Study.

The studies that have been made of consumers' reactions to the availability of different grades of service all show significant substitution effects among the service grades as a result of changing availability or changing relative prices. The Charles River Associates study is devoted almost exclusively to this question. It is based on a survey of customers of Southern New England Telephone to determine their response to a prospective new offering of optional local measured service (LMS). The study shows that if there is a significant price differential between the service grades and if customers are informed of their expected savings, if any, that would result from their switching, a substantial number of customers will switch to a lower grade of service. The Egan study shows significant substitution between flat rate and local measured service in Arkansas since LMS was introduced there in 1980. Similarly, the Mahan study shows significant substitution between single-party and multi-party lines as a result of different relative prices of the two services.

Measured service options are available to over 70.2% of residential subscribers served by the BOCs. Attachment 16 presents data on the availability of measured service in the BOCs' service areas. New York Telephone, for instance, states that it has offered a low-price usage-sensitive option called Basic Budget service since 1969. It has developed a new Life Line plan specifically targeted to needy residential customers. While this new option requires state regulatory approval, it may be indicative of future alternative services.

Preliminary results of a new study by Lewis Perl have been presented to the FCC staff and others. It appears that this study will be a very useful tool in analyzing the likely impact on subscribership of higher prices. First, it has an extraordinarily rich and recent data base. It uses 1980 Census demographic data, combined with price data that have been built up from the exchange to the country level and thus correspond to the income and demographic data. Second, as noted above, it includes measured service options in its specification. This is an important improvement and is more realistic for analyzing access demand. Third, the model is specified in logit form. This is superior to past studies based on linear models. *See* Attachment 15. Fourth, the data base is so large that it can be disaggregated to examine the effects of our decisions on various subgroups in the population. In no case do Perl's estimates indicate the likelihood of serious drop-offs as a result of price changes of the magnitude which we have estimated. Elasticity estimates calculated from Perl's results lie at the extreme low end of the range of estimates submitted by the parties. Estimates for most groups lie in the -.01 or less range. Because of their superior specification and rich data base, however, we believe that the Perl results should be given considerable weight.

Any price increase for telephone access will have some effect on demand. There will be some individuals who will have to make choices about the relative importance to them of telephone service versus other goods and services. If it is true, as these studies indicate, that individuals will substitute a lower grade of telephone service for the more expensive ones as prices rise, then the introduction of a variety of options, including lifeline service with a waiver of access charges, will help to ameliorate even the small demand effects that may occur when access costs increase. It must be emphasized here again that the average customer and probably the vast majority of customers *voluntarily* pay more than the available basic rates (compare Attachment 5 with Table 1). One would not expect any measurable number of disconnects from this large group of customers.

Finally, we wish to stress an important cautionary point. The elasticity of access demand estimates presented here were developed assuming that the determinants of demand for access (other than price) do not change. Therefore, it is *not* appropriate simply to apply them directly to the estimates of increased access costs in order to calculate the expected drop in subscribership. In order to be legitimate, any such calculation must simultaneously take explicit account of the fact that over the period in question, income, as well as other factors leading to increases in subscribership, will rise, and thereby tend to offset whatever effects higher access prices have had. Two factors of particular importance in this context are (1) the drop in long distance prices and (2) lower prices for and greater variety in CPE. Both changes make telephone service more attractive and increase the demand for access as a result.

Information on Subscriber Disconnects

We received no documented information on actual rate increases caused by the decisions cited in the Michigan petition and subsequent subscriber responses to those rate increases. Some state commissions submitted estimates of disconnects that they foresee as a result of these decisions. Some state commissions also submitted information on subscriber responses to past rate increases. The Michigan Public Service Commission presented data on subscriber reactions to rate increases by two telephone companies -Hickory and Munising. In the case of the Hickory Telephone Company, the Michigan Public Service Commission alleges that an increase in the basic residential service rate from $10.60 to $16.35 per month caused a reduction in actual main stations from 981 to 843 over a two month period. The commission states: "This drop-off is solid evidence of the effect of significant and drastic local increases." (MPSC Petition, p. 9)

We have examined carefully the Hickory data, as well as other events and circumstances surrounding the rate increase. This information is presented in more detail in Attachment 17. We conclude that the results of the Hickory rate increase provide no solid evidence of a threat to universal service that may result from possible future rate increases caused by these decisions. Other factors may have contributed to the decrease in main stations, but they are not examined in the state commission's report. Also overlooked is the elimination of four party residential service at about the time the rate hike became effective. This action terminated the only lower priced option available to residential subscribers. Further, the data presented in the state commission's report show an increase in residential one-party subscribers between September 1975, three months before the rate increase, and December 1976, one year after the rate increase. Other data presented in Attachment 17 show a continued increase in Hickory Telephone's residential subscribers.

The same observation is applicable to the data on the Munising Telephone Company, also included in the Michigan report. The number of residential main stations grew following a temporary reduction after a rate increase. These two examples may indicate that, while there may be adjustment effects and protest discontinuances, telephone demand elasticity is low.

The Public Service Commission of Wisconsin also presented information on subscriber discontinuances following rate cases which occurred during the past two years. The picture painted by this commission is mixed. In five cases, telephone companies experienced subscriber discontinuances shortly after rate increases. In eighteen cases, no data on subscriber discontinuances were available. In twenty three cases, no significant subscriber discontinuances could be identified.

AT&T has also provided the FCC with some information on the number of residential access lines before and after recent rate increases.[55] Like the information submitted by the Wisconsin Commission, AT&T's results are mixed. In two states, Oregon and North Carolina, the number of access lines was greater six months after the rate increases than it was six months before. In three states, Mississippi, South Dakota, and Pennsylvania, the number of access lines was lower six months after the rate increases than it was six months before the rate increases. The percent changes in the number of access lines in these five cases are small, ranging from a negative 0.6 percent to a positive 1.6 percent. The impact of the rate changes on the demand for residential access lines cannot be determined from the AT&T data because other factors, such as general economic conditions, population, and personal income, may also have contributed to the changes in demand, but they are not accounted for in the analysis.

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[55] Letter from W. Stump, Assistant Vice President, AT&T, to Chief, Common Carrier Bureau, October 6, 1983.

The Michigan petition is concerned with the impact of various decisions on the level of rates paid by residential subscribers for local exchange service and the potential threat to universal service. Recent experience does not support the claim that possible increases in basic residential rates caused by these decisions threaten universal service. Innovative rate structures and options for local residential service will further decrease the likelihood that residential customers will discontinue subscribing.

V. Need for Monitoring

While no apparent threat to universal service can be found from the information available in this proceeding, in the short term certain customers may be adversely affected by the decisions considered here. In order to track the effects of our decisions on residential local rates and the number of residential subscribers, the FCC has proposed an "access monitoring plan," so named because of its genesis in the Access Charge Decision.[56] Most of the parties commenting on that proposed monitoring plan endorse the concept of a monitoring program. In this proceeding, several parties have noted that the record here reinforces the need for detailed and continuous monitoring of the availability of local service.[57] We have arrived at the following finding:

Finding 5: The FCC should continue to monitor the effects of federal decisions highlighted in the Michigan Petition on local rates and the number of subscribers.

We have gathered information and developed analysis which will be useful in the monitoring program. First, the demand studies presented here can serve as important guides for our own analysis when coupled with data on rates. Second, this proceeding demonstrates the need for systematic data collections. For example, rate comparisons require information on the flat portion of usage charges, and units of usage included in the flat portion. This information will become increasingly important if service options grow and we want to analyze substitution across services. Further, much of the information needed to answer questions being posed by the public, legislators, and regulators is not now developed as a matter of course by state commissions or telephone companies. Third, the use of average rates such as proposed in the monitoring plan leads to confusion. What is included in an average? How does one average flat rates and usage—sensitive rates? The use of average rates in discussions of subscribers may also be misleading because consumers may make their decision to continue subscribing based on the lowest available rate. It will be necessary to develop extensive rate information in the monitoring plan.

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[56] The proposed plan is described in the *Notice of Proposed Rulemaking* in CC Docket No. 78–72, Phase IV. 48 Fed. Reg. 30153 (June 30, 1983).

[57] *See, e.g.,* comments of AT&T, the BOCs, United, Congress Watch, and ICA.

In our proposed plan, we favored use of data collected by the Current Population Survey (CPS) of the U.S. Census Bureau. This monthly survey asks whether the particular household surveyed (54,000 observations each month) has a telephone. This is exactly the information we need to determine the level of residential telephone penetration. Further, the survey provides data on potentially relevant demographic data. Combining the telephone penetration and demographic data from the survey with rate information from individual telephone companies will give us a valuable basis for analysis and monitoring.

The drawback of the survey data is that while they are reliable nationwide and for the ten largest states monthly, data for other states and for large metropolitan areas are only collected on an annual basis. It is thus conceivable that occurences in a small company or in a single locale would not be reflected in the survey. Some have interpreted this as an indication that the FCC would never find out about such changes "until it is too late." This is not so. We anticipate that any instance where a threat to universal service occurs will be brought to our immediate attention as well as to the attention of the appropriate state regulatory authority by the telephone company and consumers. Furthermore, the state staff in our Joint Board proceeding, CC Docket No. 80–286, is charged with monitoring bypass in the states and reporting on it to this Commission. We will describe these procedures in the monitoring program.

The most important aspect of the monitoring program will be to track the causes of local rate increases and any threats to universal service, and to recommend remedies. We intend to pursue any practical means to assure that we have the information needed to monitor service availability. We intend to make public all information collected so that other interested parties can perform their own analysis and draw their own conclusions if they wish. The Joint Board's monitoring effort established in CC Docket No. 80–286 will complement our work and offer valuable perspective from the state members of the Board.

These efforts will allow the FCC to be informed concerning local telephone rates and their affects on telephone subscribership. This information will help the FCC carry out its obligations under Section 1 of the Communications Act of 1934 in evaluating whether existing decisions should be modified and in formulating new decisions.

Alaska Communications System
Common Carrier, Hinterland Delivery
Common Carrier, Ownership of facilities
Satellite Earth Station, Joint Ownership of

Final Decision adopted regarding policies governing the ownership and operation of domestic satellite earth stations in Alaskan Bush communities.
-Message Telecommunications Service
CC Docket No. 80–584

FCC 83–605

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Policies governing the ownership and operation of domestic satellite earth stations in the Bush communities in Alaska	CC Docket No. 80–584 RM-3304

FINAL DECISION

(Adopted: December 22, 1983 Released February 21, 1984)

BY THE COMMISSION: COMMISSIONER PATRICK NOT PARTICIPATING.

Introduction and Background

1. The Commission is considering its *Tentative Decision* in this proceeding and the comments and reply comments filed in response.[1] In our *Tentative Decision*, we proposed a joint ownership arrangement to resolve the controversies over the ownership of earth station facilities in 35 Alaskan Bush communities. These facilities provide Message Telecommunications Service (MTS) to these remote communities, as well as television reception, and in some communities, private-line services. In each of these 35 locations, competing

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[1] Earth Stations re Tentative Decision to Establish Joint Ownership, 92 FCC 2d 736 (1982) (*Tentative Decision*). In response to the *Tentative Decision* five sets of comments were received from seven parties, including Alascom, Inc. (Alascom), United Utilities, Inc. (United), and General Communications Incorporated (GCI). Joint comments were filed by the State of Alaska and the Alaska Public Utilities Commission (State) and by OTZ Telephone Cooperative, Inc. and Mukluk Telephone Company, Inc. (OTZ/Mukluk). The State's unopposed motion for acceptance of its late filed comments is granted. Reply comments were filed by Alascom, United, the National Telephone Cooperative Association (NTCA), and the Secretary of Defense on behalf of the consumer interests of the Federal Aviation Administration (FAA).

applications have been filed by Alascom, which is certified to provide both intrastate and interstate toll MTS and private-line services in Alaska, and by a local exchange carrier[2] that has been certified by the Alaskan Public Utilities Commission (APUC) to provide local telephone exchange service within the particular Bush community. In our *Tentative Decision,* we proposed to resolve this controversy by licensing these earth station facilities jointly to Alascom and the local carrier.

2. A complete history of this proceeding may be found in the *Notice* [3] and in the *Tentative Decision* and will not be repeated here. Very briefly, the controversy arose in 1975 when the State of Alaska, dissatisfied with Alascom's proposal and applications to construct small earth stations throughout the state, filed competing applications. The State did not intend to operate the facilities but to lease them to a carrier who offered the most favorable terms. The Commission found the applications mutually exclusive because one facility could provide all the services proposed by either party and it did not appear to be any public interest benefits in authorizing the construction of duplicative facilities in the Bush. So that service would not be withheld, Alascom was granted temporary authority, as trustee, to operate the facilities. The temporary authorizations were conditioned on resolution of the ownership issue. Subsequently local exchange operators filed applications to construct new stations or to acquire those operated by Alascom at many of the locations. The State then requested that its applications be dismissed. At those locations where no competing application was pending, Alascom was granted a license. At the contested locations, Alascom continues to operate on temporary authority.

3. Generally, parties commenting on our *Tentative Decision* reiterated the positions they had taken earlier in response to our original *Notice* in this proceeding. Thus, little new information has been added to the record. We will not repeat these arguments and our previous analysis here. We reaffirm the general findings of our *Tentative Decision* concerning joint ownership of the Bush earth stations but modify slightly the terms of our joint ownership proposal.

4. A negotiated settlement between the competing applicants would have been the preferred resolution to this proceeding. The

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[2] The local exchange operators that currently have applications on file that are competing with those of Alascom are United, OTZ and Mukluk.

[3] Domestic Satellite Earth Stations—Alaska Bush, 81 FCC 2d 304 (1980) (*Notice*). To resolve the question of who should be licensed to operate the Bush earth stations, the Commission began a rulemaking to establish a policy governing the ownership and operation of these stations when mutually exclusive applications have been filed. There the Commission proposed to require local exchange certification by the APUC as a basic eligibility requirement to own and operate earth station facilities to provide MTS in rural Alaskan communities.

provision of service to these areas is the responsibility of the parties. It necessarily is a cooperative venture, and, as with communications service in other areas, requires agreement on a variety of matters. Agreements have been reached in some instances between Alascom and the local carrier, leading to the withdrawal of the competing application of the local carrier. In the remaining cases where the local carrier continues to pursue its application, some form of negotiated joint undertaking also would have been acceptable to the Commission. The State attempted to mediate such a settlement, but apparently was not successful.[4] From the beginning we have afforded the parties various opportunities to reach a mutually agreeable understanding.[5] We continue to encourage mutual accommodations in light of our *Final Decision* and anticipate that the APUC and the State will exert their influence and expertise to facilitate the prompt completion of the contracts needed to bring this controversy to its conclusion. Because the parties have asked that we provide guidance on certain matters that are claimed to have inhibited the drafting of an operating agreement, we will do so, but our guidance is not binding. The parties are free to come to a different result. In the event the parties, acting responsibly, are unable to conclude an operating agreement or resolve subsequent matters, or to appoint an arbitrator, the Alaska Public Utilities Commission or its designee will serve as arbitrator for all disputes not involving a matter of exclusive Commission jurisdiction. In the absence of a voluntary agreement, we terminate this proceeding by issuing joint authorizations which will require the parties to enter into appropriate operating agreements that clearly specify the rights and obligations of each joint licensee.

Comments

5. The State is willing to accept the concept of joint ownership providing certain modifications are made to our proposal. It believes these modifications are necessary in order for the concept to work. First, it believes that the Commission should clearly specify which Bush sites are eligible for joint ownership. More specifically, the State believes it necessary to clarify whether the Commission's *Tentative Decision* is applicable beyond the currently contested 35 sites. Second, the State asserts that eligible local exchange carriers should be allowed to participate in the ownership and operation of earth station facilities only if they exercise their option to do so within a reasonable period of time. Third, the State maintains that a Network Coordinating Committee should be established to protect the public interest in MTS by swiftly addressing any unresolved

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[4] *See* State's Comments at 3.

[5] RCA Global Communications, 56 FCC 2d 660, 699–700 (1975) (*Globecom*).

issues. Such a committee, comprised of Alascom, the local exchange carriers and the Deputy Commissioner for Telecommunications for the State of Alaska, would give Bush earth station minority shareholders an opportunity to participate in network planning. Finally, the State believes that the APUC should be made the initial forum for resolution of disputes among the parties. If any party disagrees with the APUC's determinations involving matters relating to earth station operations, they would have a right of appeal to the Commission. The State believes this approach makes sense because the APUC has an intimate knowledge and understanding of the Bush telecommunications network and the problems of the Bush communities.

6. United, a local exchange operator, maintains that the Commission, by not adopting the rule proposed in the *Notice* (note 3, *supra*), is denying the public the benefits that would have resulted from exclusive ownership by local exchange operators. To support this conclusion, United basically reiterates the arguments it advanced in response to our *Notice*. If, however, the Commission pursues its joint ownership proposal, United makes several suggestions for its implementation. First, United states that as a result of attempts to negotiate an agreement in accordance with the spirit of our *Tentative Decision*, it is clear that the Commission must, in its final order, provide a more equitable formula for dividing the equity in, and responsibility for, earth station ownership and operation. According to United, although the 51/49 split proposed in the *Tentative Decision* may avoid deadlocks, it will also preclude any meaningful participation by local exchange operators. If the parties are not of equal stature, joint ownership will not work. United suggests alternative approaches, which both preclude the possibility of deadlock and allow for meaningful participation by all partners. For example, United suggests that each party have a 50 percent ownership interest, with deadlocks broken by a third party sitting on a management committee appointed solely for that purpose. Additionally, United maintains that the joint ownership policies should be universally applied to all existing and future contested situations dealing with toll interconnect facilities constructed in Bush communities, including terrestrial facilities such as point-to-point microwave.

7. Alascom continues to assert that it should be awarded sole ownership of the Bush earth station facilities. Alascom claims that the Commission's revised proposals in the *Tentative Decision* do not avoid the need for hearings. Once again, Alascom claims that it is being unlawfully deprived of hearing rights afforded it by the Communications Act. According to Alascom, hearings are required to determine the basic technical and financial qualifications of the local exchange operators. Alascom also requests a hearing in regard to the partial revocations of authorizations it currently holds, the

establishment of the terms and conditions under which it would be required to sell part of its facilities, and the establishment of operational arrangements if the local exchange carriers actually become joint owners. Alascom objects to the definition of Bush communities contained in our *Tentative Decision* and adds that the proposed policy, if adopted, should only apply to the 35 locations where competing applications are presently on file. It firmly believes that its mid-route earth station facilities[6] should not be subject to a joint ownership policy. Alascom asserts that if the proposal is held to apply to future situations, a disincentive will exist for Alascom to convert terrestrial facilities to satellite facilities.

8. If the Commission insists upon adopting the proposed policy advanced in its *Tentative Decision*, Alascom states that the Commission should mandate that each joint owner must bear financial risks in proportion to its equity participation. Additionally, Alascom believes that the Commission should provide further guidance concerning the nature of the ownership interest in the earth station facilities (e.g. divided vs. undivided ownership interests), should identify what constitutes earth station equipment and should dictate what operations are to be subject to a joint ownership plan. Further, Alascom believes that the Commission should define each joint owner's role in maintaining the facilities, should dictate who has responsibility for network design and should make clear that "Appropriate Access" policies in Docket No. 16495 will not apply to Bush earth station facilities in a way which would compel Alascom to hold less than a 51 percent interest in these facilities. Also, Alascom states that the Commission should rule that separations and allocations of Bush earth station facilities in which local exchange operators would share ownership will not change present jurisdictional separations. Finally, Alascom, in its reply comments, states that a 50/50 split raises the issue of negative control and would therefore require an adjudicatory proceeding as it raises questions similar to those raised in regard to sole licensing with respect to the local exchange operators' qualifications. Additionally, Alascom believes that for the Commission to appoint a tie breaker would be an unlawful delegation of its statutory responsibilities, as well as impractical. Alascom states that it has working relationships with 27 local exchange companies and that the Commission should rely on this rather than a 50/50 split with provisions for breaking ties, which would be harmful to the successful management of the Bush earth station network. According to Alascom, its existing relationships with local exchange companies should be satisfactory for resolving most issues.

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[6] Alascom uses the term "mid-route" to describe earth stations that were constructed initially to provide services beyond basic Bush telephone service, such as those that switch MTS.

9. OTZ/Mukluk, local exchange operators, oppose the joint ownership proposal in the *Tentative Decision*. They insist that such a proposal is impractical and unworkable and that its effect will deny Bush communities the recognized benefits of the participation of local exchange operators in Bush earth station operations. According to OTZ/Mukluk, the 51 percent ownership provided Alascom in our *Tentative Decision* would perpetuate Alascom's dominance and control over essential facilities.[7] This, they believe, would be to the clear detriment of Bush residents. Additionally, they claim that both the negotiating of joint ownership arrangements, as well as joint operations of facilities, would be an expensive, time-consuming and difficult process that may, in effect, preclude local exchange carrier participation. According to OTZ/Mukluk, Alascom's majority interest could provide further incentive for it to perpetuate the inevitable conflicts. Moreover, OTZ/Mukluk point out that no party previously had proposed or discussed a joint ownership solution and argue that an involuntary imposition of joint ownership has no precedent in prior Commission proceedings. Pointing to statements in the *Tentative Decision* concerning the detriments of Alascom's dominance and the benefits of local carrier ownership, OTZ/Mukluk urge the adoption of a final ownership policy favoring sole ownership by the local exchange carrier.

10. GCI believes that the Commission should allow the local exchange carrier, not Alascom, to acquire a 51 percent majority interest. The local exchange carrier then could select a satellite carrier of its choice for a 49 percent minority ownership interest. The satellite carrier would, in turn, provide the Bush communities with interconnection in the Anchorage area to both the intrastate and interstate network.[8] GCI stresses that the *Tentative Decision* recognizes that the most significant detriment to Alascom being the sole licensee of Alaska Bush earth station facilities is the perpetuation of its total control over facilities providing MTS service to Alaskan Bush communities. According to GCI, by giving Alascom a 51 percent ownership interest in the earth station facilities, the Commission will perpetuate this monopoly. Thus, if the Commission insists on joint ownership, and will not give a 51 percent ownership interest to the local operator, then according to GCI ownership should be at a minimum 50/50. Alternatively, the joint ownership policy proposed in the *Tentative Decision* should be applied only to

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[7] OTZ/Mukluk point out that Alascom is 40 percent owner of the Anchorage cable television system, as well as 100 percent owner of Sitka Southeast Alaska Telephone which is a local exchange carrier.

[8] GCI notes that it recently was authorized to provide common carrier services between Anchorage, Seattle, Fairbanks and Juneau. It argues that no showing has been made that the Commission's pro-competitive policies are inappropriate for the Alaska Bush, and the that the *Tentative Decision* effectively provides Alascom with a *de jure* monopoly.

basic MTS within a Bush community, and not to stations that provide more than basic MTS even if located within Bush areas. In any event, conditions should be imposed on any authorization to require equal access to, and interconnection with, those facilities by other carriers at reasonable and non-discriminatory charges.

11. While NTCA continues to prefer sole ownership by the local exchange carrier, it would accept joint ownership if the 51 percent interest were assigned to the local exchange carrier. It believes that a controlling interest assigned to Alascom would be unworkable and that Alascom would use its control to continue to expand its domination over Alaskan communications. NTCA, along with GCI, states that giving Alascom any ownership interest in the earth station facilities necessarily will preclude the development of interexchange competition in Alaska. Both NTCA and GCI believe that such a result is in apparent conflict with the Commission's decision in CC Docket No. 78–72. NTCA also supports the Network Coordinating Committee proposal of the State to resolve what it believes would otherwise be certain disputes between the joint owners.

12. The FAA notes its dependency on private-line services provided to it by Alascom. This service is crucial to ensure safe, reliable air travel to all of Alaska. FAA's concerns are potential cost increases as a result of a change in Bush earth station ownership,[9] and a potential decrease in reliability if one carrier does not have end-to-end control of the private-line services it currently leases. Although the FAA prefers full ownership by Alascom, it believes the 51 percent ownership by Alascom proposed in the *Tentative Decision* is preferable to the proposal advanced in the *Notice*.

Discussion

A. *Joint Ownership*

13. Our *Tentative Decision*, which proposed joint ownership of the Bush earth station facilities,[10] was intended to resolve a long-standing controversy in a fair and administratively efficient manner. There we tentatively concluded that, failing a resolution by the parties, any outcome to this proceeding that required us to grant sole ownership to one of the competing applicants did not appear likely to best serve the public interest. This included ownership by the local carrier, as originally proposed by United in its petition for rulemak-

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[9] FAA points to the loss of cost savings resulting from a single maintenance force for both MTS and private line as an example of increased cost.

[10] United's argument that the Commission should extend the parameters of this proceeding to include all toll interconnect facilities, including terrestrial microwave, is rejected as being beyond the scope of this proceeding. This proceeding has addressed only the particular circumstances and special history of the Alaskan Bush earth station network.

ing in RM-3304 and as proposed in our initial *Notice* acting on that petition, or by Alascom, as it has consistently advocated in this proceeding. In contrast, joint ownership allows both parties to make a productive contribution to improving the quality and reliability of services offered to the Alaskan ratepayers. We therefore proposed joint ownership in our *Tentative Decision* to resolve this controversy in the absence of an agreement among the parties.

14. Our *Tentative Decision* addressed in significant detail both the benefits and the detriments of sole ownership by Alascom and by the local exchange operator. Based on the extensive record compiled on the attributes and capabilities of the applicants, we concluded that the best resolution to this proceeding was to license the facilities jointly. The complementary capabilities of Alascom and the local exchange operators would not be lost under such an arrangement. We also found that joint ownership would maintain the operations of a unified Bush MTS satellite network, and would avoid any unnecessary costs occasioned by replacement of existing Bush earth station facilities. This approach further insured that Alascom's technical expertise would remain available for Bush earth station operations in these communities. Moreover, the benefits of the local exchange carriers' presence in Bush communities would be available to maintain the earth stations. Alascom's central role in current MTS satellite network planning was recognized, as were the incentives of the local exchange carriers to provide the highest quality service within the Bush communities they are certified to serve. In summary, joint ownership provides for participation in the planning and operation of Alaskan satellite facilities by both of the parties involved in the provision of MTS service to a Bush community.

15. Although we now believe some adjustment in relative ownership shares is necessary, we continue to believe joint ownership a pragmatic means of providing service efficiently to Bush communities when ownership of the earth stations is still in conflict. And we believe it is workable once operating contracts are negotiated by the parties. This view also appears to be shared by the expert State regulatory authorities in Alaska who have been intimately involved over the years in the establishment of effective communication services in the Alaska Bush. The arguments advanced by the parties in opposition to the *Tentative Decision* are essentially the same as those advanced in response to our earlier *Notice*.[11] Both

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[11] OTZ/Mukluk point out that the three cases cited in note 27 of our *Tentative Decision* in support of joint ownership involve voluntary agreements among the parties. A voluntary agreement for joint ownership was made by the applicants at the outset in the most recent of the cases cited, which involved the MARISAT satellite system. However, in the earlier two decisions the Commission approved joint ownership to avoid comparative evaluation of pending proposals for competing underseas cables and INTELSAT earth station facilities. In all three cases, an urgently needed facility was required to provide services which all of the

Alascom and the local exchange operators continue to restate the benefits of their sole ownership. Because these arguments were fully considered in our *Tentative Decision*, and no more convincing arguments have been advanced, we are not persuaded to reach a different conclusion. Additionally, no new information has been provided to convince us to change our finding that each of the applicants is fully qualified to participate in a joint ownership arrangement.[12] Accordingly, we re-affirm our finding that joint ownership is the best resolution to this proceeding.[13]

16. Most of the parties, whether opposed to the concept of joint ownership or not, suggested modifications in the event we adopt this proposal.[14] We address these proposed modifications below.

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parties would use in the provision of service to the public. Duplicative facilities were unnecessary. In the case of the Bush earth stations before us now, and in the absence of agreement among the parties, we believe the underlying factors involving service to the public are sufficiently similar to the above cases to warrant adoption of a rule imposing a similar solution to similar problems. Nothing in Section 309 of the Act precludes us from imposing such an ownership structure if we determine that this result best serves the public interest. Our legal authority to impose such a rule in lieu of formal hearings is addressed in note 13, *infra*. For a more thorough discussion see paragraphs 40–47 in our *Tentative Decision*.

[12] Hence we need not again address Alascom's claim that the local exchange carriers are unqualified to be sole licensees. We also note that the APUC, in response to our *Tentative Decision*, has not raised concerns about the capabilities of local exchange carriers to be joint owners of the earth station facilities. Earlier, in response to our *Notice*, it raised concerns about the relationship between its certification of local exchange carriers to provide local service and their qualifications to be the sole owners, but our proposal of joint ownership appears have alleviated this concern. We believe each of the applicants is qualified to participate in a joint ownership arrangement.

[13] Alascom continues to dispute our authority to award station authorizations to any applicant other than itself without a full, oral hearing. We have reviewed this issue both in our *Notice* and *Tentative Decision*. While Alascom also disputes our authority to order joint ownership in responding to our *Tentative Decision*, it provides no additional legal basis for its position beyond that presented in response to the *Notice*. Alascom's claim for a hearing as a result of its perception that joint ownership constitutes a partial revocation of its outstanding temporary authorizations is similarly unsupported by legal authority and is rejected. Because Alascom, in its comments and reply comments, raises no points that we have not already addressed, we will not repeat our analysis of its arguments. This rulemaking proceeding has afforded the parties all hearing rights due them under the Communications Act, and is a reasonable exercise of our discretion. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[14] One particular suggestion from United proposes that we award the license solely to one applicant in each community. United's proposal would result in Alascom being sole licensee in 51 percent of the Alaska Bush villages, while reserving the remaining stations for sole ownership by a local exchange carrier. This solution, in several cases, requires the authorization of local exchange carriers to own and operate facilities for which they have not yet applied. Additionally, this approach effectively results in sole ownership by the local carrier as initially proposed in our *Notice*. It would suffer from the same problems set forth in our *Tentative Decision* concerning sole ownership, and is therefore rejected.

B. *Division of Ownership*

17 In our *Tentative Decision* we proposed that ownership of the Bush earth station facilities in dispute be divided with Alascom receiving 51 percent and the local exchange carrier receiving 49 percent. In proposing an unequal ownership share, our primary concern was to assure dispute resolution. Thus, we tentatively concluded that if one owner had a controlling interest, it would prevent deadlocks in the event the joint owners could not reach mutual agreement. Absent a clearly controlling entity, we feared that each time the licensees were unable to reach agreement on financial, technical or operational questions, they would likely turn to the Commission for resolution.

18 Some parties suggest that, if joint ownership is adopted, the 51 percent ownership interest should be held by the local exchange carrier. We recognized in our *Tentative Decision* that such an arrangement would put greater emphasis on the interests of the local carriers. However, the potential could arise for uncoordinated decisions at the various Bush locations. This could be detrimental to the Alaskan MTS satellite network as a whole. Additionally, it could undermine our decision that Alascom retain its role as current MTS satellite network manager in the Bush. The comments and reply comments received in response to our *Tentative Decision* contain no persuasive demonstration that majority ownership by the local carrier would be better than by Alascom.

19 Although we are not persuaded to give a majority interest to the local carriers, their arguments that they will not be able to participate in a meaningful way under our *Tentative Decision* proposal are well taken. In all probability such an ownership split would burden local operators with the costs of minority participation in a capital intensive venture without the operational or management benefits of ownership to which a substantial equity owner should be entitled. Thus, we believe that it may be impossible to preserve the affirmative advantages associated with both owners without equal equity participation. An equal ownership division reflects the fact that although each carrier has an area of primary expertise and control, the provision of telecommunications service to the public is a joint undertaking. Alascom has primary expertise in and exercises primary control over the overall Alaska MTS satellite network serving the Bush communities. The local exchange carriers have primary expertise in and exercise primary control over the local exchange. The Bush earth stations are the point at which these areas of expertise overlap. Notwithstanding the division of expertise and control, the carriers share equally the responsibility of assuring efficient, economic and reliable MTS within the context established by the State, and to a lesser extent, federal, regulatory authorities. An equally divided ownership share appropriately reflects this

responsibility. A 51 percent interest in all contested locations could intensify Alascom's dominance and control over essential communication facilities. If local carriers are not allowed to participate on a meaningful level, many of the benefits we foresaw in joint ownership (paras. 13–15, *supra*), could be lost. Conversely, giving the local exchange carrier a 51 percent interest also raises problems with coordinated network design and operations. This could present difficulties in the maintenance of overall network efficiency. For these reasons, absent an agreement by the parties, we believe an equal ownership division is both equitable and workable.

20 A number of parties fear such a division could result in decisional deadlocks. Several alternatives have been suggested to avoid deadlocks and minimize Commission involvement in the decision making of the joint owners. One suggestion would have us establish a 50/50 equity split with equal representation on the management committee of each joint entity. The parties could then appoint a third party to cast a deciding vote in case of deadlock. Another suggestion had deadlocked matters submitted to an independent tribunal. Alternatively, it was suggested that we require the parties to include a third equity partner in the ownership structure.[15] The State, whose equity participation is allegedly established,[16] was given as an example of a possible third partner. The State recommended that a Network Coordinating Committee be established, with the committee's suggested resolutions appealable to the APUC. Final appeal would be to the Commission in matters pertaining to earth station facilities.

21 We have reached the conclusion that equal ownership interests should not result in irreconcilable differences among the parties. And an undue emphasis on areas of potential disagreement loses sight of a fundamental point: provision of reliable and efficient Bush telephone service must ultimately be a joint responsibility of Alascom and the local exchange carrier. This responsibility must be fulfilled in a manner that serves the public interest. The provision of basic telecommunications services frequently requires agreement among different carriers on a wide variety of matters so that the public may receive service. There is no apparent reason why Alascom, and the exchange carriers, acting responsibly, cannot successfully conclude a joint operating agreement. While telephone service to the Bush is subject to regulatory oversight by both the APUC and this Commission irrespective of the final ownership structure of the Bush earth stations, the responsibility for providing that service rests with the carriers themselves.

22 We do, however, emphasize our belief that the APUC and the

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[15] This is not, according to United, without Commission precedent. *See* CML Satellite Corporation, 51 FCC 2d 14 (1975).

[16] *See* note 23 *infra*.

State, because of their understanding of the Bush telecommunications network and of the problems confronting the Bush communities, are in a particularly good position to make recommendations concerning any problems that might arise pertaining to the Bush villages. As recognized experts in telecommunications in Alaska, we expect the APUC and/or the State to continue to exhibit a high interest in the development of service to Bush communities and, to the extent necessary, to participate in actively aiding the joint licensees to resolve promptly any controversy that may arise. For this reason, we are adopting with slight modification the State's proposal that the APUC, or its designee, arbitrate all disputes not involving exclusive Commission jurisdiction.[17] The joint licenses will be conditioned to require that the parties specify some means for arbitration to resolve controversies that may arise before or after operating contracts are negotiated, and, absent agreement by the parties on a different arbitrator, the APUC will serve in that capacity. Although we are conditioning this authorization on the parties submitting to arbitration any matters that otherwise might be irreconcilable, we do not view this action as a delegation of our adjudicatory function. Disagreements, if any, are likely to center around the details of ownership and operation of the joint facilities, and as such would not be expected to invoke the jurisdiction of this Commission. Such matters are normally attended to by the carriers involved without Commission intervention. In any case, the Commission could intercede if there were a public interest reason to do so. We anticipate, however, that this would rarely be the case, judging from past experience with joint providers of telephone service. Thus, we see the local authorities playing a number of roles in subsequent developments. First, we encourage both the APUC and the State to continue to assist the parties in reaching a private negotiated agreement. In the absence of agreement the parties are required to submit to binding arbitration. Unless the parties agree on another arbitrator, the APUC, or its designee, is designated to serve in that capacity. Finally, if the disagreement concerns matters within the Commission's exclusive jurisdiction, we will consider the views of the local authorities in reaching a decision. Any correspondence the joint owners send to the Commission must be served on the APUC and the State.[18]

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[17] As authority for referring disputes to the APUC, the State cites Section 410(a) of the Communications Act. Alascom states that the Commission, under Section 410(a), is precluded from delegating adjudicatory functions. We disagree. Sections 410(a) and 410(b) provide, in relevant part, that the Commission may refer any matter arising in the administration of the Communication's Act to a joint board, that the joint board may be comprised of a member from a single state and that the Commission may confer with a State concerning carriers subject to the jurisdiction of both the State and this Commission. However, at this time, we believe it unnecessary for purposes of this authorization to consider what role a formal joint board might have in adjusting the relationship between Alascom and the local carriers.

23 The FAA expresses concern over the possibility of decreased service reliability and increased cost if one carrier does not have end-to-end control of the private-line services it currently leases. We believe that these concerns can be addressed even if we do not give controlling interest to Alascom. Many services are not provided by a single carrier end-to-end. Even in the contiguous states, long-distance services are provided by interstate carriers with local terminations provided by local telephone companies. Yet, well established industry standards and practices insure that services are provided reliably. FAA has not provided any factual basis for its concerns, and we see no reason to believe that cooperative actions by Alascom and the local exchange carriers will not similarly lead to reliable service to the Alaska Bush for private-line service as it already has for MTS. Indeed, comparable situations exist with respect to Alascom's use of earth stations licensed to unaffiliated companies to provide services between Alaska and the contiguous states. As to increased costs, we note the State, which represents all consumers of telecommunications services in Alaska, supports joint ownership over sole ownership by Alascom.

24 This *Final Decision* adopting joint ownership will not retard the development of interexchange competition in Alaska, or be in conflict with the Commission's decision in CC Docket No. 78–72, as suggested by GCI and NTCA. As recognized in our decision on this matter,[19] competition in the provision of services to the Alaska Bush will not be precluded by our Bush earth station ownership policy. Although we currently contemplate only one MTS earth station in a Bush village, multiple carriers may seek access to these facilities to provide services in competition with those provided by Alascom and the local exchange carriers. And while Alascom will be the sole licensee of about 65 percent of the Bush stations, it will also share ownership with another carrier in the remaining 35 percent for the first time. This ownership interest, even if only partial, still provides a meaningful role to the local carriers to develop new or more efficient Bush services. In addition, GCI or other carriers may be able to develop proposals for other facilities that do not conflict with our findings in this proceeding that the duplicative MTS earth stations proposed by Alascom and the exchange carriers would not serve the public interest.

25 In summary, it appears that this proceeding can be concluded and our policy objectives best achieved by adopting a joint ownership

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[18] We would expect that agreement of both parties would be needed for a discretionary filing for new facilities or services, but that either party could supply information or other filings required to be submitted to the Commission.

[19] MTS/WATS Market Structure Inquiry (*Phase II*), 92 FCC 2d 757 (1983).

structure in which both Alascom and the local exchange carriers can have equal equity positions in the earth stations at issue. We believe this approach, rather than one in which one or the other applicant has a controlling interest, will provide the greatest incentives to each party to maximize its contributions in the areas where it has the most to offer. Moreover, this balancing of the capabilities and incentives of the joint owners to cooperate fully in the provision of economical and efficient Bush service will be strengthened further by the continuing reliance we are placing on the active involvement of the APUC and State in the development of Bush earth station services within Alaska. We have been convinced by the comments on our *Tentative Decision* that the other resolutions considered herein could eliminate a potentially willing and valuable contributor to the Bush earth station facilities.

Implementation

26 Our *Tentative Decision* indicated that the joint owners should themselves define their respective operational roles,[20] although several general principles were described to structure initially the joint ownership arrangement.[21] We initially believed that these general guidelines would be sufficient to allow the parties to complete the necessary contracts. Indeed, had we then issued a *Final Decision* ordering joint ownership, the competing applicants likely would have lacked the incentive to find issues that hindered the completion of operational contracts. However, assuming the impediments are real, we give further guidance below with respect to those issues that the parties have identified as areas of potential or actual dispute. To some extent, these issues were identified by Alascom and the local exchange carriers as support for the position that joint ownership is an unworkable solution that should be abandoned. Thus, with the certainty that joint ownership is to be adopted, we believe these problems will be resolved. However, to the extent that they remain obstacles to the creation of operating contracts, the guidance provided below is sufficiently specific to allow the parties, negotiating in good faith, to reach a mutually acceptable joint ownership agreement.[22] The parties are, of course, free to reach different arrangements. Moreover, we expect that the active involvement of the APUC and the State will further facilitate the prompt resolution of any differences of opinion that might arise between the joint owners.

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[20] *Tentative Decision* at para. 53.

[21] *Id.* at paras. 53–57.

[22] We disagree that we must specify the final details on these matters, as suggested by some parties. The parties, even without general guidance, should be capable of negotiating final agreements on all matters. Moreover, the licenses we are issuing are conditioned on binding arbitration on all matters not subject to overriding state or federal regulatory jurisdiction.

27 The licenses are being issued for the existing facilities now in service in the Bush communities. The local exchange operator will be acquiring a 50 percent interest in those facilities.[23] In those few cases where new earth station equipment has been proposed by the local carrier, no convincing demonstration has been made that the ratepayer will be better off with new facilities. While these Bush earth stations were constructed at the risk of Alascom and the State without prejudice to the ultimate resolution of this proceeding, caution is warranted in permitting their replacement by local exchange carriers. If the reliability of a particular Bush earth station is in question, installation of additional equipment should be a much less expensive alternative. However, the basic design of the Bush network, as agreed to by Alascom and the State, appears adequate. Thus, local exchange carriers are afforded an opportunity to invest in existing Bush earth station facilities, not to construct new facilities.

28 United believes that among the most difficult of the unresolved issues are those that are related to valuation, but none of the parties has demonstrated why they should not be able to come to an agreement. United suggests that the purchase price for local carriers be the lower of net book value or replacement cost. We had previously indicated that ownership of the Bush facilities should be at net book value,[24] and United has not demonstrated that our prior analysis was flawed. One way to proceed would be for Alascom to prepare an inventory of the equipment to be included in the jointly owned earth station[25] and certify the current net book value. Alascom could then provide this certification of the earth station net book value to the appropriate local exchange carrier, the State, and the APUC. With respect to the method by which the local exchange carrier pays Alascom for its ownership interest, we believe, again,

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[23] United states that an ownership issue exists as to the State's share in existing stations. The State had previously stated its intention to convey its ownership interest to the ultimate licensee. *Notice* at 308. According to United, some accounting formula must be established to reflect the State's investment and it believes that the Commission should ascertain the State's position regarding its investment. However, the State has not raised this as a concern, and we believe that the question of the State's current investment, if any, in the earth station facilities is a matter of concern for the State and the ultimate licensee and does not preclude the Commission from resolving the current facilities authorization question.

[24] *Notice* at para. 42.

[25] In this instance we would define earth station facilities as including all radio frequency components and channel units interfacing with the switching facilities of the local carrier. Power and other support facilities are included in earth station facilities if dedicated to satellite service. Common facilities should be allocated among the functions sharing them in proportion to use, but not to exceed current charges where applicable. Common facilities not currently covered by existing Alascom arrangements should not be included in earth station facilities except as mutually agreed to by the joint owners.

this is a matter best negotiated by the parties, but that Alascom should be compensated within a reasonable amount of time following the execution of the joint ownership agreement.

29 We see no need, as suggested by United, to prescribe special accounting treatment of the assets acquired, investment tax credits, depreciation and other items.[26] It seems to us that operating expenses ought to be charged directly to the causative function. We expect that the local exchange operator would perform all activities for which local employees are qualified through training. Alascom employees would be flown into the Bush communities only when necessary to perform specialized repairs or maintenance. Each of the parties could establish a time accounting system for its employees to document expenses billed to the joint venture.

30 Alascom claims that a possible effect of applying existing settlements and separations arrangements may be a disproportionate distribution of the financial risks of Bush earth station ownership and operation between the joint partners. To the extent that this is a possibility, Alascom appears to suggest that normal separations and settlement processes should not apply to the proposed ownership arrangements. However, no party has identified any specific changes in these processes required as a result of joint ownership. We agree with Alascom in principle, however, that, absent an agreement to the contrary, a local exchange operator who chooses to participate in joint ownership and operation of Bush earth station facilities should expect to bear financial risks in proportion to its equity participation.

31 Alascom and United differ as to what should be the nature of the joint ownership structure. One of United's suggestions was that the ownership of each earth station be divided by individual pieces of equipment. This seems both undesirable and impractical. Ownership interests, as suggested by Alascom, should be held on an undivided basis. The alternative of divided ownership of the station with each owner holding title to discrete components with the aggregated value equal to the designated party's ownership interest appears unworkable. It is highly unlikely that some combination of earth station components would add up to the exact percentage interest desired by each joint owner. Additionally, divided ownership would not permit a sharing of the obligations and responsibilities of earth station ownership and operation.[27] In addition, separate books and records should be kept by both carriers with respect to their contributions to

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[26] The joint owners are subject to the accounting regulations of the APUC and this Commission.

[27] The only rationale offered for divided interest shares was speculation that low interest REA loans might not be available if ownership was undivided with Alascom holding 51% interest. No evidence was presented to support the validity of this concern. Additionally, although previously a participant in this proceeding, the REA did not submit comments to support such speculation.

jointly owned Bush earth stations. Such books and records should be open for inspection by either partner.[28]

32 With respect to the design and operation of the Bush satellite network, we stated both in our *Notice* and in our *Tentative Decision* that it is Alascom that is ultimately responsible for the integrity, both technical and operational, of the current Alaskan MTS satellite toll network. It is primarily within Alascom's expertise to establish reasonable technical and performance standards for the Alaskan toll network, and Alascom is responsible for its space segment facilities presently serving the Bush, although the local operators will have valuable contributions to make. The parties should prepare, on a yearly basis, the "Alascom Satellite Communications Transmission Plan."[29] With the contributions from the State and APUC, the plan should represent a consensus of the parties.

33 With respect to Bush earth station operations, we recognize that an Alascom operator is not continually present in the Bush community to control directly the earth station transmitter. Instead, the station is remotely monitored and controlled from Anchorage by Alascom. Alascom does not regularly maintain technical or operating personnel for maintenance and service in the Bush communities and travel is expensive. Thus, the local exchange personnel should be capable of and responsible for all regularly anticipated maintenance and service functions at the Bush stations. As network manager, Alascom would oversee overall system operations and guide local exchange operators in performing troubleshooting or other routine or non-routine preventive or corrective maintenance. This includes (but is not limited to) adjustment of r.f. carrier frequencies or powers, tests, line-up, and the like. All functions that can be performed locally, including equipment adjustment or replacement, local monitoring and testing, antenna clearing, general housekeeping, etc. could be the responsibility of the local exchange operator. In general, it seems that as much maintenance as possible should be performed by the local operator within the Bush village to avoid unnecessary travel costs to Alascom. Within a reasonable period of time, we expect that Alascom employees would not be required to make any inspection trips to the Bush sites that are jointly owned. With adequate training and the remote control and monitoring center in Anchorage, local operators should become

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[28] In addition, records should be kept reflecting such factors as the life of each station component, its depreciation, retirement, and investment tax credit.

[29] *See Tentative Decision* at para. 53 and note 38. In light of our decision-making mechanism for the joint ownership arrangement, there does not appear to be a need to require that a formally structured Network Coordinating Committee, as proposed by the State, be imposed on the joint owners at this time. We would, however, encourage any informal arrangement under which all of the participants in the provision of Bush communications services could exchange information on a regular basis. This could be applied to the development and updating of the transmission plan or other relevant documents and procedures.

capable of performing all but the most sophisticated maintenance. Apart from an occasional inspection trip for specialized preventive maintenance, Alascom employees should not be required to visit the Bush sites except when needed for new equipment installation or non-routine corrective maintenance or repair.

34 Thus, it would be helpful for the parties to develop a maintenance handbook which clearly delineates reliability objectives and assigns responsibilities to the different carriers to identify and clear satellite transmission problems.[30] Modular earth station designs could allow failed equipment to be replaced and returned to a major city for repair. Test equipment should therefore be held to a minimum of basic equipment typically required for local exchange operations. Sophisticated equipment could be retained in the central or regional depots or monitoring center.[31] The amount of spare equipment at each jointly owned Bush station could be that recommended by the manufacturer or as otherwise agreed to by the joint owners.

35 While it may be, as United suggests, normally best to colocate earth station and local exchange facilities, such arrangements do not presently exist in all Bush communities. To the extent that they do not, the local carrier could acquire its percentage interest in the facilities as they presently exist. Thus, pre-existing site leases, power and space agreements which Alascom already has entered into with various villages could continue in effect for the joint owners until renegotiation becomes necessary in the eyes of both partners or until the present leases and agreements expire. Generally, Alascom is expected to define requirements for space and utilities for the earth station equipment, while the local exchange operator would select the physical location where the earth station facilities would be located and arrange for utilities in accordance with satisfying those specifications. Such a procedure could be followed in new situations or in existing situations when both parties agree relocation is necessary. With respect to the actual negotiations on price and terms and conditions of the leases, we would expect them to be negotiated jointly by the parties.

36 Both Alascom and United request that the Commission specify

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[30] We expect that analogous procedures already exist between Alascom and the local carrier with respect to the joint provision of MTS services. With joint ownership we expect these arrangements would be expanded to include Bush earth station functions.

[31] The parties have expressed various views on the desirability of regional depots for equipment and maintenance, including United's proposal for a system distinct from Alascom's. We discourage duplicative support and maintenance networks. Since Alascom operates a statewide network and the majority of Bush earth stations, its existing network could be modified as necessary to support jointly owned earth stations. Investment and operating costs of regional depots would be borne by Alascom, with charges made to the joint owners as costs are caused by operation of the jointly owned Bush stations.

the definition of toll interconnect facilities subject to our Bush earth station ownership policies. The joint ownership policy applies only to earth station equipment and operations, and not to the design and operation of the space segment. A convenient demarcation between the Bush station and the local exchange operations for purposes of this ownership arrangement could be at the point where the earth station channel units interface with the local exchange switching facilities. United's or the carrier's investment in local exchange facilities, including land, buildings, and generators, would not be subject to the joint ownership policy. However, we expect that to the extent that these facilities are used for joint ownership operations, any lease payments for these facilities would be charged to the joint owners.

37 This additional guidance is based on the evidence before us and our best judgment. However, we see no reason why the parties were not able to structure an operating agreement within the framework outlined in the *Tentative Decision*. Nevertheless, we have responded to their request. In the event they still are not able to agree on either the terms of an operating agreement or on subsequent matters, they are required to enter into binding arbitration. In the unlikely event that arbitration proves necessary, we believe that the arbitrator should avail itself of the expertise of each co-owner. Thus, because Alascom has greater knowledge regarding network configuration issues, and is ultimately responsible for the integrity of the current Alaskan MTS satellite network, its expertise concerning these issues should be given significant weight in arbitration. Conversely, the local exchange carriers' expertise should be given significant weight if disputes involve local arrangements for Bush earth station facilities or regularly anticipated maintenance and service functions. This presumption in favor of the expertise of one joint owner may be overcome, however, upon clear and convincing evidence that acceptance of those views would be contrary to the public interest.

Procedural Matters

38 The staff will complete its processing of the pending Bush applications and issue formal licenses as soon as possible after the effective date of this decision. The licenses will be issued jointly to the two applicants with the technical parameters proposed in the Alascom application[32] subject to the joint operating agreement to be negotiated by the parties. The grantees will be expected to begin negotiating immediately operating contracts and to conclude them within a 180-day period from the effective date of this decision. If the

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[32] Alascom has kept current its applications during the course of this proceeding. They, therefore, should accurately reflect the current status of the facilities. We see no need to require the local exchange operators to amend formally their applications to either include by reference, or to duplicate, the material in Alascom's filings.

parties cannot reach agreement, arbitration should be initiated sufficiently in advance to permit an agreement to be finalized within the 180 day period. We fully expect the continuing efforts of the State and the APUC to facilitate a successful and timely completion of these arrangements. We also expect that the mandatory arbitration clause to be inserted in the contract will assure that each party's interests are represented.

39 In our *Notice*, we recognized that Section 214 authorization would have to be granted to the local exchange carrier in view of the interstate nature of satellite communications. However, our findings with respect to the public interest determinations on joint ownership are sufficient for both the radio station licenses under Title III and the necessary authorizations under of Section 214. Thus, we certify that the public interest, convenience and necessity would be served by the joint operation of these Bush earth station facilities.

40 Finally, we must address the applicability of this decision to situations that might arise in the future. We emphasize that our determinations are limited to similar situations that involve mutually exclusive applications by certified MTS interexchange and local exchange carriers for earth station facilities to provide such services in small, rural communities in Alaska. The parties in this proceeding have not disproved our finding that duplicative MTS facilities must be avoided for now if basic telephone service is to be provided economically to these Bush communities. Our joint ownership policies are not intended generally to apply to facilities characterized by Alascom as "mid-route" facilities.[33] Additionally, the application of this policy should not retard any economical or efficient conversion of terrestrial to satellite facilities.[34] Situations invoking this Bush earth station policy would, as proposed in the initial rule of Appendix B to the *Notice*, be limited to competing applications by such carriers for (a) earth stations providing MTS (b) within a community of less than 1,000 persons. We agree that the opportunity for a local exchange operator to participate cannot be open ended. Thus, we believe the fairest way to balance these concerns in Bush villages not involved in the 35 joint authorizations granted today is to confirm that Alascom will be the sole licensee of the Bush earth stations in those villages where Alascom currently has a license,

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[33] Even the term "mid-route" is not always precise. *See* note 6, *supra*. We also recognized that the mutual exclusivity that forms the basis for this proceeding in 35 specific communities is not automatically applicable throughout Alaska. *See RCA Global Communications, supra* note 6, at 689–690.

[34] Alascom suggests that the application of this policy to future situations may provide a disincentive for it to convert terrestrial facilities to satellite facilities. However either Alascom or the local exchange carrier may file an application for an earth station to serve the Bush community.

even if there is a certified local exchange operator who has not filed a competing application.[35] These licenses therefore no longer are subject to this proceeding.

Conclusion

41 With this decision, we bring to a close the dispute regarding who should own MTS earth stations in the Alaskan Bush. While we would have much preferred a private resolution by the parties, in its absence our best judgment is that an equal ownership interest by the contending parties—each of whom necessarily is involved in the provision of MTS to the Bush—best serves the public interest, convenience and necessity. Because the parties have been unable to craft a final operating agreement, we have provided guidance where they say it is needed. We think it unlikely that any further guidance regarding either the operating agreement or subsequent disputes will be needed. Should any such controversies or subsequent disputes arise, they will be resolved by arbitration. In the unlikely event that the dispute includes a matter of exclusive Commission jurisdiction, we will fulfill our public interest responsibilities. We do not expect any such disputes to arise, however, as the parties, as joint licensees, turn their energies from litigation to the provision of efficient communication service to the Bush at reasonable charges.

42 In light of the discussion above, and pursuant to Sections 4(i), 4(j), 201(a), 214, 303, 307, 308, 309 and 319 of the Act, 47 U.S.C. §§154(i), 154(j), 201(a), 214, 303, 307, 308, 309, and 319, we find that the public interest, convenience and necessity will be served by joint ownership of the Alaska Bush earth stations, the establishment of channels of communications, and the interconnection of the facilities of Alascom and local exchange carriers as set forth above.

43 We previously determined that a regulatory flexibility analysis is not required because the proposed rule immediately affects only three entities and thus will not have a significant economic impact on a substantial number of small entities. No party commented on this matter and we re-affirm that conclusion.

44 Accordingly, IT IS ORDERED that the applications listed in Appendix A to the *Notice* in this proceeding ARE GRANTED and the applicants ARE AUTHORIZED to operate the facilities jointly as

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[35] Local exchange operators have had up to four years of notice since the filing of United's initial application of the procedure by which they are expected to file competing applications with those of Alascom, and the State has protected the ability of the local carriers to make such filings since 1975. In fact, in several Bush villages, the local exchange operator withdrew its pending application after entering into an agreement with Alascom. We believe that the benefits to be derived from local exchange operators' participation in planning and operating the Alaska Bush network must be balanced with the need for a resolution to this long-lived controversy. Thus, we believe that local exchange carriers who have not yet filed applications in Busch communities currently served by Alascom have effectively elected not to participate.

specified in the formal instruments of authorization for these earth stations, and to establish channels of communication between those bush locations and Anchorage, Alaska via the space segment facilities of Alascom, Inc.

45 IT IS FURTHER ORDERED that these authorizations are subject to the condition that the parties shall immediately enter into good faith negotiations to establish their respective operating and financial responsibilities and shall submit such contracts to the Commission and the Alaska Public Utilities Commission within six months from the effective date of this *Final Decision*. In the event that elements of these contracts remain in dispute, the parties shall appoint an arbitrator, who, in absence of a mutually agreed upon party, shall be the Alaska Public Utilities Commission or its designee. The arbitrator shall be notified of all terms in dispute in sufficient time to render a decision within 180 days of the effective date of this order. The contracts shall contain a provision for arbitration of disputes.

46 IT IS FURTHER ORDERED that the policies specified above shall apply to the resolution of any similar controversy over competing applications for a new Bush earth station facility that might arise in the future as set forth in paragraph 40 above.

47 IT IS FURTHER ORDERED that the Secretary shall cause appropriate publication of this order in the Federal Register and that it shall be effective 30 days thereafter.

48 IT IS FURTHER ORDERED that the proceedings in CC Docket No. 80-584 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Criteria
Cross Interest
Ownership and Management Integration of
Remand

On remand, Review Board selects new broadcast permittee under standard comparative issue, concluding that superior qualitative enhancement credits for integrated minority and female ownership overcame credit for previous broadcast experience. The quantitative integration credit of two top applicants was too close to provide a clear comparative choice.
–New Continental B/cing Co.
BC Docket No. 79–305

FCC 83R–96

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THE NEW CONTINENTAL BROADCASTING COMPANY Miami, Florida	BC Docket No. 79–305 File No. BP-21251
DADELAND BROADCASTING, INC. Miami, Florida	BC Docket No. 79–307 File No. BP-780906AN
COMMUNITY BROADCASTERS, INC. Miami, Florida	BC Docket No. 79–310 File No. BP-780906AH
THE NEW RADIO AMERICA BROADCASTING INCORPORATED Miami, Florida	BC Docket No. 79–312 File No. BP-780906AJ

SUPPLEMENTAL DECISION

(Adopted: November 16, 1983; Released: November 22, 1983)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. By Memorandum Opinion and Order, 53 RR 2d 1004 (1983), the Commission reopened the record and remanded this proceeding to the presiding Administrative Law Judge for exploration of a

misrepresentation issue that it added against The New Radio America Broadcasting Incorporated (New RAB).[1] The ALJ subsequently approved a joint settlement agreement involving New RAB and dismissed New RAB's application with prejudice.[2] Under the terms of the Commission's remand order, 53 RR 2d at 1009, 1010, the proceeding now reverts to the Review Board for the comparative selection of a new permittee.

2. The tools of choice at this time are the comparative analyses in our previous decisions (see note 1, *supra*), relevant case precedent, the "Motion to Reopen the Record and Enlarge the Issues" filed June 15, 1983 by The New Continental Broadcasting Company (New Continental), and the responsive and supplementary pleadings of the parties. We conclude that grant of the application of Community Broadcasters, Inc. (Community) will best serve the public interest, convenience, and necessity.

3. We reaffirm our previous holding that Community and New Continental are entitled to a slight preference over Dadeland Broadcasting, Inc. (Dadeland) under the comparative criterion[3] of diversification of control of the media of mass communications. 88 FCC 2d at 851, 50 RR 3d at 1133. Under the criterion of participation in station operation by owners, we again conclude that, in terms of quantitiative integration credit, Community has 52.5% full-time credit and 37.5% part-time credit, compared to New Continental's 51% full-time credit and Dadeland's 30% full-time and 2.5% part-time credit. 88 FCC 2d at 850, 50 RR 2d at 1132. The quantitative disparity between Dadeland's proposal and that of Community and New Continental is sufficiently "clear" that Community's and New Continental's advantage cannot be overcome by the qualitative attributes of Dadeland's participants.[4] *See Van Buren Community Service*, 87 FCC 2d 1018, 1022, 50 RR 2d 115, 119 (Rev. Bd. 1981), *rev. dismissed*, 50 RR 2d 1433 (1982). Hence, Dadeland cannot garner an integration preference, and, when its diversification "demerit" is also considered, it becomes manifest that Dadeland must finish a distant third in the comparative competition. On the other hand, Community's quantitative edge over New Continental is too slight, standing alone, to warrant any appreciable integration preference.

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[1] In Decision, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981), *recon. denied*, 89 FCC 2d 631, 51 RR 2d 266 (Rev. Bd. 1982), the Review Board had previously awarded the construction permit for the deleted facilities of AM Station WFAB, Miami, Florida, to New RAB.

[2] Memorandum Opinion and Order, FCC 83M-1757, released May 27, 1983.

[3] *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965).

[4] We also note that Community and New Continental each propose to integrate more than 50% of their ownerships fulltime into station operations, while Dadeland proposes a very modest 30% full-time integration. *Cf. Gilbert Group, Inc.*, 88 FCC 2d 401, 50 RR 2d 87 (Rev. Bd. 1981) (only slight integration credit awarded because preferred applicant had less than 50% full-time integration).

4. Turning to the critical qualitative enhancement factors of minority and female ownership, local residence, past participation in civic affairs, and previous broadcast experience, we note that we previously summarized the overall enhancement credit to be awarded to New Continental's integration proposal as "high" and to Community's proposal as "moderate," "slightly heightened." 88 FCC 2d at 850 & n. 21, 50 RR 2d at 1132 & n. 21. At this juncture, given the closeness of the case, it is appropriate to reexamine these composite averages, analyzing each enhancement factor separately and comparatively before drawing any overall conclusions.

5. Community's 90% integrated ownership is Hispanic and female; New Continental's 51% integrated ownership is Hispanic and male. In so finding, we depart from our previous analysis in this proceeding, in which we failed to focus on the *stock ownership interests* of integrated principals when measuring enhancement credit and instead focused on what *percentage of the total number of integrated principals* was minority or female. While "100%" of the integrated owners of New Continental are Hispanic (Emilio Milian is the only proposed integrated owner), Mr. Milian's attributable ownership of New Continental's stock is 51%; hence, New Continental can only be credited with 51% minority enhancement credit. *E.g., Bradley, Hand and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982) (51% minority enhancement credit given to 51% integrated owner). Similarly, Community's two integrated owners, Teresa Saldise (52.5%) and Marie Elena Duran (37.5%), are both Hispanic females; nevertheless, Community may only be credited with 90% minority enhancement credit and 90% female credit, *id.*, rather than 100% credit for each, as was done in our previous Decision, *supra*.

6. Even with these adjustments, Community's qualitative edge over New Continental on these two enhancement factors - - especially female ownership - - has achieved decisional significance in the instant case by virtue of recent Commission precedents. For example, in *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1266, 52 RR 2d 1063, 1068, 1069 (1982), the Commission held that its "minority ownership policy is to be given . . . significant weight in comparative broadcast proceedings" and awarded "substantial" enhancement credit for a 100% minority/100% female integration proposal. And in *Horne Industries, Inc.*, ___ FCC 2d ¶ , 54 RR 2d 249, 258–59 (Rev. Bd. 1983), the Board recently interpreted *Waters* to mean that "the general threshold for awarding any *significant* comparative qualitative enhancement for integrated minority ownership should be set at a more-than-50% (or otherwise controlling) interest level" (emphasis added), and we opined that "[t]he same general threshold would be appropriate . . . with respect to comparative merit for female ownership." In the instant case, both New Continental and Community have integrated minority ownership control (more than 50%

stock ownership), their respective controlling stockholders are both proposed as full-time general managers, but Community is entitled to greater minority enhancement credit fo its 90% vs. 51% minority ownership integration advantage. *Cf. Absolutely Great Radio, Inc.*, FCC 83-465, released October 13, 1983 (minority enhancement credit given for mere 0.5% ownership edge). *A fortiori*, Community merits substantial enhancement credit for its 90% vs. 0% integrated female ownership. *See Horne Industries, Inc., supra*, at 257 (100% integrated female ownership vs. 0% awarded a "solid qualitative integration enhancement").[5]

7. As to local residence and past participation in civic affairs, New Continental and Community are essentially equal. Focusing on the full-time integrated principals, Mr. Milian and Ms. Saldise have both been Miami residents since 1964-65 and have both been extensively involved in civic affairs. The fact that Milian may have been more involved than Saldise from 1971 to 1976 is balanced by Milian's substantial diminution of activity since 1976, at the very time that Saldise was increasing her significant involvement. See Decision, *supra*, 88 FCC 2d at 846-48, 50 RR 2d at 1130-31. Thus, while noting that we previously denied Dadeland's exception that Milian's civic activities were not sufficiently current to warrant significant enhancement credit, *id.*, we hold here that this "significance" is no greater than Saldise's, especially when the activities are compared in 1983. *Cf. Veterans Broadcasting Co., Inc.*, 38 FCC 25, 61, 4 RR 2d 375, 417 (1965) ("7 years of withdrawal from the civic scene" criticized where civic activities enhancement credit sought).

8. Since Community's principals lack any previous broadcast experience, it cannot be gainsaid that New Continental is entitled to enhancement credit for Milian's 31 years of broadcast experience (1946-1977). However, we reaffirm our prior conclusion that the ALJ accorded too much weight to that broadcast experience. Decision, *supra*, 88 FCC 2d at 847, 50 RR 2d at 1131. As we said there, amongst enhancement elements broadcast experience is deemed to be of only minor significance since emphasis on this factor could discourage qualified newcomers from entering the field and since it generally confers only an initial advantage. *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910; *but cf. Global Broadcasting Group, Inc.*, 54 RR 2d 404, 408 (1983) (broadcast experience has "added significance" in proceeding to select *interim* licensee for an ongoing operation).

9. Combining the preceding separate analyses of the applicants' qualitative enhancement credits, we conclude that Community's credits for female and minority integrated ownership substantially exceed New Continental's credit for previous broadcast experience and give Community an overall slight integration preference over

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[5] See paragraph 9, *infra*, for a discussion of credit diminution due to the 37.5% part-time component of Community's 90% minority and female integration proposal.

New Continental, when these qualitative credits are weighed with the quantitative integration proposals. In this weighing process we have duly considered that qualitative enhancements attributable to less than full-time integration proposals do not have an equal enhancing effect. *Cf. Van Buren Community Service*, *supra* (by implication) (40% 30-hour per week integration with 40% female enhancement credit merits slight integration preference over 10% full-time integration with 10% female enhancement credit). Hence, the strength of Community's minority and female credits is somewhat diminished to the extent that they are attributable to Community's 37.5% part-time quantitative integration (see paragraph 3, *supra*). Nevertheless, with Community's 52.5% full-time quantitative integration as the starting point for qualitative enhancement comparative consideration (versus New Continental's 51% full-time integration and 0% part-time) the qualitative superiority of Community's total integration proposal is sufficiently great to overcome New Continental's credit for broadcast experience and make Community the winner under the standard comparative issue. *See Cannon's Point Broadcasting Co.*, ___ FCC 2d ___, 53 RR 2d 953 (Rev. Bd. 1983), *recon. denied*, FCC 83R-38, released May 13, 1983 (qualitative enhancement credits for 100% female integration and past local residence overcome credits for 100% previous broadcast experience of 20 years and proposed future residence); *cf. North Carolina Radio Service, Inc.*, 92 FCC 2d 621, 52 RR 2d 993 (Rev. Bd. 1982), *rev. denied*, FCC 83–211, released May 3, 1983 (only arguable difference between applicants was winner's 49% female integration).

10. What remains for consideration is New Continental's motion (as supplemented) to reopen the record and enlarge the issues, in which it seeks a remand and the addition of qualifying and comparative issues against Community to determine whether Community owner Saldise's husband, Pedro Ramon Lopez, was "the top management official" at AM Station WOCN, Miami, Florida, during the first six months of 1982 and purchased somewhere between 12% and 45% of WOCN's stock "approximately eight months" before June 2, 1983 (i.e., in October 1982), all without notifying the Commission, in violation of the reporting requirements of Section 1.65 of the Commission's Rules, 47 CFR 1.65, the Commission's cross-interest policy, and the AM "duopoly" provisions of Section 73.35(b)(1) of the Rules, 47 CFR 73.35(b)(1). For support, New Continental relies on the affidavits of its principal Emilio Milian and of four former WOCN employees who were either fired or quit during early to mid-1982. In reply, Community asserts that Lopez never had any ownership or management relationship with WOCN but did serve for an average of two to three hours per week on an intermittent basis as a business and financial consultant to WOCN during the first six months of 1982. According to Lopez's affidavit, this consultancy occurred in his capacity as president and chairman

of the board of the General Federal Savings and Loan Association of Miami, Florida, a full-time position, and he was never an employee, director, or shareholder of WOCN. In addition, Community presents the affidavit of Mr. Carlos B. Fernandez, who specifically contradicts Milian's contention that he (Fernandez) ever sold his 12% interest in WOCN to Lopez.

11. New Continental's motion will be denied for failure to establish the requisite *prima facie* case of wrongful conduct, either factually or legally, which must precede issue enlargement. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1097, 50 RR 2d 1251, 1257 (Rev. Bd. 1982), *rev. dismissed*, FCC 83I-129, released November 9, 1983. As to the facts, New Continental's WOCN ownership charges against Lopez are not supported by any documentary evidence or the non-hearsay affidavit of a person having personal knowledge of the facts. Section 1.229(d) of the Rules, 47 CFR 1.229(d). On the other hand, affidavits by the alleged seller and purchaser of the WOCN stock (Fernandez and Lopez) deny that such a transaction occurred. As to the law, while there is a conflict of affidavits concerning the extent of Lopez's alleged managerial role at WOCN, this dispute lacks legal significance since it is not alleged that Lopez has any ownership or managerial role in Community, and there has been no probative evidence presented that Lopez has any ownership interest in WOCN. In other words, where an attempt is made to raise cross-interest, multiple ownership, or diversification issues because of the involvement of an applicant principal's non-owning and non-managing spouse in other media, it must be shown that the spouse has an *ownership* interest in the other media. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 426, 49 RR 2d 606, 609 (1981) ("the *ownership interests* of Mrs. Roberts in the proposed applicant and Mr. Roberts in Comcast create a potential for common control" (emphasis added)). No such showing was made here, and, in light of the Commission's recent characterization of the *Klein* spousal attribution doctrine in *Absolutely Great Radio, Inc., supra*, at para. 6, as involving the treating of "*media interests* of a husband and wife in combination" (emphasis added), and refusing to extend *Klein* to other matters, we likewise decline to find a legally cognizable nexus between Community and WOCN via the possible managerial role of Lopez at WOCN in early 1982. The "control" relationship that New Continental seeks to establish, even if provable, is simply too tenuous to warrant Commission concern. Hence, no ownership or reporting issues will be added.

12. Having reexamined the comparative qualifications of the three remaining applicants in this proceeding, we conclude that Community has demonstrated itself to be superior to New Continental under the important integration criterion of the comparative issue, and that both Community and New Continental are superior

to Dadeland. Therefore, grant of Community's application will best serve the public interest, convenience, and necessity.

13. ACCORDINGLY, IT IS ORDERED, That the motion to reopen the record and enlarge the issues, filed June 15, 1983 by The New Continental Broadcasting Company is DENIED, and the motion for leave to file a second supplement to that motion, filed October 28, 1983, IS GRANTED; and

14. IT IS FURTHER ORDERED, That the application of Community Broadcasters, Inc. (File No. BP-780906AH) for a construction permit to establish a new AM station at Miami, Florida, IS GRANTED, and the applications of The New Continental Broadcasting Company (File No. BP-21251) and Dadeland Broadcasting Company, Inc. (File No. BP-780905AN) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Broadcast Experience
Broadcast Record, Past
Diversification, of Control of Mass Media
Reconsideration

Review Board denied reconsideration of Decision. Commission will not explore at hearing the boardcast experience or past broadcast record of an applicant absent an adequate threshold showing.

Where exceptions to an Initial Decision have been filed, automatic stay precludes treating presently prevailing applicant as construction permittee holding media interest for diversification purposes in another proceeding.

–Old Time Religion Hour, Inc.
BC Docket No. 80–445

FCC 84R–1

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THE O.T.R.H., INC., THE OLD TIME RELIGION HOUR, INC. Galveston, Texas	BC Docket No. 80–445 File No. BPCT-5173
ALDEN COMMUNICATIONS OF TEXAS, INC. Galveston, Texas	BC Docket No. 80–446 File No. BPCT-780907KE
BLUEBONNET BROADCASTING COMPANY Galveston, Texas	BC Docket No. 80–447 File No. BPCT-780907KE
For a Construction Permit for a New Commercial Television Station	

MEMORANDUM OPINION AND ORDER

(Adopted: January 10, 1984; Released: January 13, 1984.)

BY THE REVIEW BOARD:

1. On November 7, 1983, Alden Communications of Texas, Inc. (Alden) filed a petition for reconsideration of our Decision, 95 FCC 2d ___ , 54 RR 2d 989 (Rev. Bd. 1983), which affirmed the ALJ's

selection of Bluebonnet Broadcasting Company (Bluebonnet) as the best comparative applicant in this proceeding, *see* Initial Decision, FCC 83D-11, released February 18, 1983. Alden disputes the awarding of any ownership integration credit to Bluebonnet, asserts that it (Alden) is entitled to greater - - and controlling - - diversification credit than the slight-to-moderate credit already awarded, and, if these objections are unsuccessful in winning a grant for Alden, urges that the proceeding be remanded for exploration of a past broadcast record issue against Bluebonnet. Bluebonnet opposes the petition, and Alden has replied.

2. In the main, Alden's petition attempts to raise a character issue against Bluebonnet's principal stockholders, based on the allegedly unusually poor broadcast record of Station KDOG-TV (now KRIV-TV), Houston, Texas, prior to 1978 when they sold their combined 60 percent interest in it. On its surface Alden's attack is two-pronged. First, it urges the novel proposition that when an applicant's principals have prior broadcast experience, they have an affirmative duty to demonstrate how well they discharged their past responsibilities, and where, as here, they decline to make such a showing and oppose receipt of evidence on the subject, the Commission must presume that the evidence is adverse and deny any ownership integration credit to these principals. Second, Alden reiterates its prior exception to the ALJ's conclusion that Alden's threshold showing was inadequate to warrant inquiry into the past broadcast record of Bluebonnet's principal Raymond G. Schindler. In reality both objections are rehashes of Alden's previously unsuccessful efforts to convince the ALJ and the Board to allow a full-scale, renewal-type exploration into the 1971–74 program performance of Station KDOG-TV, a facility only remotely related to this proceeding (see above).

3. Puristically speaking, the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 398, 5 RR 2d 1901, 1910, 1912–13 (1965), distinguishes between the "previous broadcast experience" of an applicant's principals and the "past broadcast record" of other stations with which the principals have been associated because of past ownership interest and significant participation. "Experience" is intended to focus on the conduct of the *individuals* and "record," on the accomplishments of the *stations*. *Id.* Nevertheless, subsequent case precedents reveal an eliding of these distinctions. *E.g.*, *East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 173, 21 RR 2d 992, 997 (1971) (individual principal's "past broadcast record" of conduct held unusually poor). This development is without material consequence here because, whichever rubric is used, an adequate threshold showing of "particularly poor or good" previous experience, *Policy Statement, supra*, or "unusual" broadcast record, *Gilbert Group, Inc.*, 49 RR 2d 1081, 1082 (1981), must precede exploration of these matters at hearing, even though no special issue

need be added, *cf. East St. Louis Broadcasting Co., Inc.*, 9 FCC 2d 212, 216, 10 RR 2d 859, 864 (Rev. Bd. 1967). This need for a threshold showing distinguishes an applicant's attempts to obtain special merits or demerits for experience or record from the routine enhancement credit afforded previous broadcast experience without the requirement of a threshold showing of excellence. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 847, 50 RR 2d 1117, 1131 (Rev. Bd. 1981). Thus, it is clear that, contrary to Alden's view, Bluebonnet was not required in the instant case to demonstrate the excellence of its principals' previous experience or record. Rather, the burden of adequate threshold showings challenging this experience and record fell to Alden, and, as we previously indicated in our Decision, *supra*, and need not repeat here, *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), Alden has stumbled under the weight. We affirm Bluebonnet's substantial integration preference and the ALJ's refusal to permit hearing on the past broadcast record of Bluebonnet's principals.[1]

4. As to petitioner's diversification argument, Alden is correct that because exceptions to the Initial Decision in *Colorado Television, Inc.*, FCC 83D-45, released August 3, 1983, that granted it a construction permit for a television station at Denver, Colorado, have been filed, its 100% ownership of that application may not presently be ascribed to it as a media interest for diversification purposes. *See* Section 1.276(d) of the Commission's Rules, 47 CFR 1.276(d) (timely exceptions stay effect of an Initial Decision).[2] Nevertheless, we affirm our previous judgment that Alden merits only a slight-to-moderate diversification preference over Bluebonnet, given Alden's 80% attributed interests in the permittees of television stations in Seattle, Washington, and Portland, Oregon, and its 10% interest in a television permittee in Las Vegas, Nevada. While Bluebonnet's media interests are more numerous and are all located in Texas or Arkansas, the closest is 132 miles from Galveston, and the disparities in number, ownership percentage, and location are

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[1] We reject Alden's argument that the Board erred in striking certain post-1974 KDOG-TV performance data that Alden belatedly proffered to us. The question before us was whether an adequate threshold showing had been made *to the ALJ* to warrant further hearing, and Alden concedes that the subject data were not proffered to the ALJ. Alden's tardy proffer of more evidence to *us* sheds no light on the correctness of the ALJ's treatment of the data before him and is too late. *See Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

[2] While the automatic stay of Section 1.276(d) does not void the Initial Decision, until the stay is dissolved it cannot be said that Alden is the "permittee" of a Denver television station, only that there is an extant Initial Decision - - not yet effective - - in which Alden's application is granted. While that Initial Decision remains the "law of the case" unless and until overturned by higher authority, it cannot confer any substantive rights until the stay is lifted. Hence, for diversification purposes, it is premature to regard Alden as having a presently cognizable media interest in Denver.

not sufficiently great to warrant a larger preference for Alden, even excluding the Denver construction permit. *See* Decision, *supra*, at 997; *Policy Statement*, *supra*, 1 FCC 2d at 394–95, 5 RR 2d at 1908–09.

5. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Alden Communications of Texas, Inc. on November 7, 1983, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Financial Qualifications
Instructional Television Fixed Service
Legal Qualifications
Programming

Applications of the Public Broadcasting Service for national network of stations in the Instructional Television Fixed Service granted, and petitions to deny denied, upon finding that applicant is legally and financially qualified, proposed programming service is permissible under Section 74.931 of the rules, and a grant of the applications will serve the public interest. *-Public B/cing Service*

FCC 83-611

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of PUBLIC BROADCASTING SERVICE For Construction Permits in the Instructional Television Fixed Service	File Nos. BPIF-820113MB *et al.*[1]

MEMORANDUM OPINION AND ORDER

(Adopted: December 30, 1983; Released: January 9, 1984)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING.

I. Introduction

1. The Commission has before it 82 applications, filed between January 13, 1982 and June 25, 1982, by the Public Broadcasting Service (PBS) for authority to construct stations in the Instructional Television Fixed Service (ITFS) for the distribution of video educational and training materials as part of a "National Narrowcast Service" (NNS).[2] The Commission also has before it: (1) pleadings

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[1] See Appendix for list of applications being considered.

[2] Twenty other applications were filed by PBS and are still pending. In addition, several of its member stations have filed individual applications for ITFS facilities that would be part of PBS's National Narrowcast Service. Certain of the issues considered in this document have been raised against the remaining PBS applications and those of its member stations. However, those applications also have procedural, technical or other problems apart from the applications and pleadings now under consideration. We have determined that those applications should be processed and acted upon by the Mass Media Bureau, pursuant to

captioned "Petition to Deny" filed by Microband Corporation of America (Microband) against all of the PBS applications; (2) pleadings and letters in opposition and reply; and (3) related correspondence.

2. PBS's proposed "National Narrowcast Service" would consist of a nationwide system of ITFS stations joined together through PBS's satellite distribution network. This system is designed to provide instructional, educational, cultural, professional training, and informational video materials throughout the country. PBS regards this system as a medium through which some of its specialized learning materials, as well as other unique and scarce educational programming, can be widely disseminated. NNS is also viewed by PBS as a logical extension of the expanding role of its member public television broadcast stations and programming is proposed which would serve national and local interests. According to PBS, the nationally oriented programming will pool sufficient resources to carry specialized materials to persons across the country, including areas that do not currently have access to such resources. The locally oriented programs would help meet the demand for "in school" and other educational materials which cannot be met by the time and single channel constraints of public television broadcast stations. As a part of its proposal, PBS has agreed to assign its ITFS stations, upon request, to the member PBS television broadcast station serving the community where the proposed ITFS station will be located.

3. Microband, the licensee of approximately 100 stations in the Multipoint Distribution Service (MDS), has filed petitions to deny against all of the PBS applications. Its interest in these applications stems from the *Notice of Inquiry, Proposed Rulemaking and Order* in General Docket No. 80–112, 45 Fed. Reg. 29,323 (1980). This rulemaking proceeding was initiated by the Commission to consider the reallocation of channels in the 2500–2690 MHz spectrum, which had been reserved exclusively for ITFS use, so that additional channels could be available for MDS and the Private Operational Fixed Service (OFS), with a reduction in the number of channels reserved for ITFS. Microband had expressed concern that the National Narrowcast Service was actually an effort by PBS to "warehouse" as many ITFS channels as possible, so as to prevent the Commission from reallocating them to the other services. On May 26, 1983, the Commission adopted the *Report and Order* in Docket No. 80–112 which, *inter alia,* reallocated 8 of the 28 former ITFS channels to MDS; grandfathered existing ITFS licensees and permit-

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delegated authority. To the extent that this document resolves common issues in favor of the applicants, those issues need not be considered further by the Mass Media Bureau in acting on the remaining applications of PBS and its member stations.

tees of, and applicants for, the reallocated channels; and permitted ITFS licensees to utilize ITFS excess channel capacity for non-ITFS purposes (including commercial use), either by themselves or by leasing to third parties. 48 Fed. Reg. 33,873 (1983). In addition to the warehousing concerns, Microband challenges PBS's legal and financial qualifications to be a licensee in the Instructional Television Fixed Service, and the appropriateness of PBS's proposed programming on ITFS channels.

II. Procedural Matters

4. It appears that Microband claims standing as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act of 1934, as amended, based on its ownership interest in stations in the Multipoint Distribution Service, on its participation in the General Docket No. 80–112 proceeding, *supra*, and its speculation that "each and every entity with an interest in MDS or OFS, including Microband, would be severely prejudiced" if the PBS applications were somehow permitted to effect the outcome of the rulemaking proceeding. PBS, in opposition, alleges that Microband lacks standing because (1) Microband's petitions are not supported by affidavits of persons with personal knowledge of the facts alleged; (2) there has been no showing that Microband will compete with PBS for marketplace revenues; (3) no electrical interference has been asserted; and (4) Microband's participation in the General Docket 80–112 rulemaking does not confer standing. In a subsequent filing, PBS contends that the conclusion of General Docket No. 80–112 renders moot Microband's claim to standing based on it being prejudiced in that proceeding if the PBS applications were granted. PBS maintains that, at the most, Microband can claim standing only with respect to the relatively few applications filed by PBS for those channel groups which were ultimately reallocated for MDS use. Because the matters set out in Microband's pleadings either address matters alleged by PBS or refer to matters of which we can take official notice, Microband's failure to support its pleadings with affidavits is not fatal. We find, however, that participation as a party in a rulemaking proceeding, such as General Docket No. 80–112, does not generally confer standing as to application proceedings, and that the Commission's continued acceptance and processing of ITFS applications during the pendency of the rulemaking proceeding and the grandfathered status of pending applications after adoption of the new rules preclude a finding of an interest that would accord standing in this specific case. Furthermore, Microband has failed to allege facts to show that any of the PBS operations would compete for audience and revenue with any Microband operation. Thus, we conclude that Microband has failed to demonstrate that it has standing to file a formal petition to deny against all the PBS

applications. Nevertheless, Microband's pleadings will be considered on their merits as informal objections.

III. Spectrum Warehousing

5. Microband expresses a "grave concern" that PBS and its member stations have filed applications for over 100 ITFS stations to foreclose the possibility of reallocating the 2500–2690 MHz band for non-ITFS users. As mentioned above, the Commission issued a *Notice of Inquiry and Proposed Rulemaking* in General Docket No. 80–112 to obtain public comment on reallocating the 2500–2690 MHz band to provide additional channels for MDS and OFS use in that band. Microband contends that PBS and its members filed the ITFS applications solely to protect their own interests and have no intention of actually constructing the facilities. In reaching its conclusions, Microband relies heavily on statements in trade press releases which were attributed to PBS, and the fact that certain public broadcast associations had made statements indicating that they were opposed to the then-proposed ITFS spectrum reallocation. Even if the press was accurate in reporting that PBS was encouraging its members during the pendency of General Docket No. 80–112 to submit applications for channels while they were still available, we do not deem such action objectionable. The Commission chose not to bar new applications or to foreclose action on pending applications during the reallocation rulemaking proceeding and, therefore, new applicants were free to apply for channels allocated for ITFS. Nor was PBS obligated, as Microband suggests, to seek the approval of the Temporary Commission on Alternative Financing for Public Telecommunications to file its applications.[3] Furthermore, no evidence is offered to support Microband's conclusion that PBS does not intend to construct the requested facilities. The PBS applications were timely filed and, as amended, contain all the technical, financial and programming information necessary for processing ITFS applications. Microband notes, however, that PBS did not submit an implementation schedule in accordance with Section 74.902(c) of the rules. However, contrary to Microband's contentions, this will not preclude the processing of PBS's applications. This rule was intended to apply to ITFS applicants that propose to place ITFS channels for the same area into operation over an extended period of time. This is not the case here. PBS will be required to construct and begin operation on its stations within the one-year period afforded ITFS permittees under Section 73.3598(b) of the rules. If construction is not completed during this period, any request subsequently filed for an extension of construction time will be considered on its merits

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[3] This Commission was established by Congress in 1981 to conduct a study to explore sources of available revenue for public telecommunications entities. See *Omnibus Budget Reconciliation Act of 1981*, Pub. L. No. 97–35, Section 1232(a)(1), 95 Stat. 731.

at that time. Accordingly, we conclude that Microband's allegations are unsupported, speculative and fail to present a substantial and material question of fact regarding PBS's intent to construct the facilities for which it has applied and present no basis for further inquiry on this matter.[4]

IV. Legal Qualifications

6. Microband also alleges that PBS, whose Articles of Incorporation provide that it cannot be the licensee of broadcast stations, is not legally qualified to be an ITFS licensee. First, Microband asserts that PBS is ineligible because the provision in Section 74.932(a) of our rules under which PBS seeks to establish its eligibility would require that the applicant be eligible to receive a noncommercial educational *broadcast* license. Second, Microband argues that since PBS cannot be a broadcast licensee, then becoming a licensee of ITFS stations would exceed the powers vested by PBS's Articles. According to Microband, PBS is limited by its Articles to providing only interconnection and related services to its member public broadcast stations.

7. PBS claims that it is eligible to become an ITFS licensee based on its alleged eligibility for a noncommercial educational television broadcast station. Microband challenges that position. That issue need not be resolved since we find that PBS possesses the attributes to come within the scope of the eligibility requirements set out in Section 74.932(a) of our rules, which reads in relevant part as follows:

> A license for an instructional television fixed station will be issued only to an institutional or governmental organization engaged in the formal education of enrolled students or to a nonprofit organization formed for the purpose of providing instructional television material to such institutional or governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended. A nonprofit organization which would be eligible for a license for a noncommercial educational television broadcast station is considered to be eligible for a license for an instructional television fixed station . . ..

PBS is eligible based on its status as a nonprofit educational organization which provides educational, cultural and other informational programming to its audiences. We believe our eligibility requirements for ITFS are sufficiently flexible to include an entity such as PBS; *i.e.*, a nonprofit organization whose mission is educational in nature and which is proposing a programming service that is within the scope of the permissible uses of ITFS stations. Our rules should not be interpreted as limiting the licensing of ITFS facilities only to educational institutions with enrolled students or to those educational organizations formed for the *sole* purpose of providing video instructional materials to such institutions. An entity like PBS, although providing other services and meeting other needs, is uniquely qualified to confront and meet the challenges of the ever changing and increasing educational and informational demands of our society. It is therefore appropriate to recognize that nonprofit organizations, like PBS, are eligible for ITFS licenses if they are clearly educational in nature, and propose educational, instructional and informational services, as provided by our rules. PBS is a national, nonprofit, private organization that has distributed educational, informational and cultural programming to its member stations (nonprofit and noncommercial television broadcasters) since its formation in 1969. Originally, the plan was to have the member stations transmit educational, cultural and other programming to "schools and school systems." See *Congressional Quarterly Research Reports*, 1967, Vol. 1, p. 161–180. PBS and its members have evolved to provide informational and cultural programming not only for schools, but for a much wider audience within their communities. PBS's role in the dissemination of educational materials has been ever expanding and it views its National Narrowcast Service, utilizing a network of ITFS stations, as a logical extension of its services and as a means of meeting the demand for educational programming which cannot be met solely by noncommercial educational broadcast stations. PBS's proposed programming includes, for example, university or secondary school courses in economics, math, accounting, languages and marketing, as well as other video informational materials directed at specific groups; *e.g.*, professionals and the elderly. See discussion on "Programming" below. In view of the foregoing, we find that the nature of PBS and its proposed services contain the attributes necessary to meet the eligibility requirements of our rules.

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[4] As noted, General Docket No. 80–112 reallocated only the E and F channel groups for MDS use and grandfathered existing ITFS licensees and permittees of, and applicants for, those channel groups, as of May 26, 1983. Of the 102 applications filed by PBS, only 17 are for E and F group channels. Thus, the concern as to "warehousing" expressed by Microband when it filed its pleadings has been considerably lessened insofar as MDS users are concerned by the subsequently adopted rules in Docket 80–112.

8. Having established that PBS is eligible under our rules to become an ITFS licensee, we must now address the question of whether PBS is empowered by its Articles of Incorporation to own and operate ITFS stations. The purposes of PBS an enumerated in its Articles of Incorporation would appear to be sufficiently broad so as to not preclude a national distribution system of the type contemplated by the National Narrowcast Service.[5] It is Microband's

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[5] Article III of its Articles of Incorporation, reads, in part, that:

> The purposes for which the Corporation is organized are:
>
> * * * * *
>
> 8. To otherwise administer, forward and advance the development and operation

contention, however, that the last paragraph in Article III of PBS's incorporation articles which reads, in relevant part, "nor shall the Corporation apply for or accept a license to own or operate any noncommercial or other *broadcast* station [emphasis added] under the rules of the Federal Communications Commission," poses a bar to PBS's ability to become an ITFS licensee. The short answer to Microband's contention is that ITFS stations are not broadcast stations. Their purpose is "primarily to provide a means for the transmission of instructional and cultural material in visual form with associated aural channel *to specified receiving locations*. . .." Section 74.931(a) of our rules [emphasis added]. In fact, FCC Form 330-P (the ITFS construction permit application) specifically calls for the location of ITFS receive sites. This factor is inconsistent with the definition of "broadcasting," which refers to programming intended for the general public. *See*, 47 U.S.C. § 153(o); *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir.), *cert denied* 361 U.S. 813 (1958); and *Notice of Inquiry, Proposed Rulemaking and Order* in General Docket No. 80–112, *supra*, at paragraph 31. Accordingly, no further inquiry into this matter is warranted and any further consideration of whether PBS's Articles preclude it from becoming an ITFS licensee is a matter appropriately left to local authorities and not the Commission.

V. *Financial*

9. Microband alleges that PBS has failed to demonstrate that it can meet the construction and initial costs of operation for its proposed ITFS facilities. Our review of PBS's financial information in its applications shows that it has established its qualifications. In an amendment filed on May 4, 1983, PBS indicated that the total amount needed for the proposed 102 ITFS stations would be $12,291,000 (for each station, average construction and equipment costs would amount to $119,400 and the cost of operation for three months would be approximately $1,100). To meet these costs, PBS states a preference to raise funds from outside sources, but indicates the availability of $5,786,000 in working capital (as of December 31, 1982). Moreover, even if the principal financial plans of PBS should prove to be insufficient, it has a loan commitment letter, dated April 25, 1983, from Riggs National Bank for up to $12,000,000. It is important to note that we have long recognized that more latitude is required in assessing the financial qualifications of educational stations because of the various sources they have to rely upon for funding. See *NTA Television Broadcasting Corp.*, 22 RR 273, 291

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of interconnection and distribution systems, facilities and services, and to complement, assist and support noncommercial broadcasting pursuant to the Public Broadcasting Act of 1967 as it may from time to time be amended . . .

(1961). Accordingly, we find PBS has made a sufficient showing to establish its financial qualifications.

VI. Programming

10. Microband contends that PBS has failed to provide the Commission with the required programming information for ITFS applicants. It also argues that the information submitted by PBS is inconsistent with Section 74.931 of the rules which sets out, in part, the permissible uses of ITFS when the Commission authorized the service in 1963.[6] Specifically, it is argued that the programming directed at organizations or groups other than students in educational institutions is inconsistent with the Commission's mandate in Section 74.931 that ITFS be used primarily to provide instructional and cultural programming to students enrolled in accredited educational institutions.

11. PBS counters that NNS is within the traditional and permissible uses of ITFS and represents an innovative approach to accomplishing the intended uses of this service. PBS describes the National Narrowcast Service as being designed to distribute programming nationally via PBS's satellite system. PBS lists the programming as falling into five basic categories, namely, (1) formal course materials to students in local educational institutions; (2) in-service training and instruction to provide special skills and courses on professional development; (3) current information and developments in professional, technical and various specialized fields; (4) educational and cultural exchanges outside the context of courses and classrooms; and (5) administrative.

12. We reject Microband's contentions that more extensive programming information is required (*e.g.*, hour-by-hour scheduling) and that NNS does not represent a permissible use of ITFS. The proposed programming information provided is sufficient for us to conclude that the channels will be used substantially for legitimate ITFS purposes. The "Typical Program Schedule" (See PBS applications, Attachment to Exhibit P-1, for more detailed description) exhibits several categories of programming expected to be aired on

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[6] Section 74.931 states, in relevant part, that:

> (a) Instructional television fixed stations are intended primarily to provide a means for the transmission of instructional and cultural material in visual form with an associated aural channel to specified receiving locations for the primary purpose of providing a formal education and cultural development to students enrolled in accredited public and private schools, colleges, and universities.
>
> (b) Such stations may also be used for the additional purpose of transmitting visual and aural material to selected receiving locations for in-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors.

the average day. It includes programs for senior citizens on nutrition, budgeting and personal safety; formal training for nurses; showings of museum exhibits; professional development seminars; and storytelling for children (to be viewed in libraries). PBS also submitted more detailed programming information, at the request of the Mass Media Bureau, for three representative communities with varying emphasis on programming for elementary and secondary schools, health care institutions, and the continuing professional education needs of engineers in high technology industries. For each city, PBS included the receive locations, audience(s) to be served, a brief description of the program offerings, the source of programming and the programming status, *i.e.*, existing, in production or to be developed. See PBS correspondence dated June 15, 1983. It is sufficiently clear that a significant portion of the programming would be directed to educational institutions, with the balance aimed at libraries, professionals and other groups which PBS has identified as having a need for instruction or continuing education and training. Moreover, we note that the *Report and Order* in General Docket No. 80–112 further expanded the uses of the spectrum formerly allocated solely for ITFS, and, while requiring ITFS licensees to use their channels "substantially for legitimate ITFS use," as set forth in footnote 6, *supra*, ITFS licensees are also permitted to use excess channel capacity for non-ITFS and even commercial uses.

13. In a related matter, Microband challenges the need for the four-channel system sought in most of the PBS applications. It argues that two or three channels would be sufficient to air the programming proposed by PBS. Given the programming information submitted, it would be premature for us to substitute our judgment for that of PBS concerning the number of channels that will be needed. The classroom instruction for elementary and secondary schools and for formal training courses for adults might easily require a channel each for the morning session; so might courses for college students, training seminars for specialized workers and lectures by accomplished musicians and artists similarly demand a channel each during the afternoon session. Thus, in conjunction with the more detailed listing of actual programs for the three representative communities set forth by PBS, we are satisfied that PBS has shown a legitimate need for four channels, where available. We recognize that the NNS represents an ambitious, innovative and novel effort in the dissemination of educational and instructional materials and, as such, PBS will need time to develop its programming fully. Notwithstanding the absence of exact schedules, we conclude that PBS has made the threshold showing to support its applications for four channels and do not wish to foreclose prematurely the possibility of NNS reaching its potential.

VII. Commercial Use

14. Microband alleges that PBS proposes to use the ITFS channels for commercial purposes. Microband admittedly bases its allegations on secondary sources, such as trade press reports, and concedes that it did not know what were PBS's actual intentions. We cannot rely on representations in trade reports. without additional substantial corroborating evidence, when the information filed with the Commission clearly shows programming which complies with our requirements for ITFS stations. Furthermore, PBS has expressly denied the allegation that it intends to use its stations for commercial purposes. It is significant, though, that even if PBS intended to use its ITFS stations for limited commercial purposes, commercial use of excess channel capacity would be a permissible use as a result of the *Report and Order* in Docket No. 80–112, *supra*. In that proceeding, as noted, the Commission recognized the financial concerns and problems often experienced by ITFS licensees and authorized the use of excess ITFS channel capacity on a profit-making basis. Therefore, assuming *arguendo* that PBS did plan commercial use of its facilities, such a use would be permissible so long as the stations were used substantially for legitimate ITFS needs.

VIII. Conclusion

15. Upon careful review of the applications filed by the Public Broadcasting Service, and the pleadings, we find that no substantial and material question requiring further proceedings is presented. We note that for applications filed March 8, 1982 through June 25, 1982, PBS failed to submit the geographic coordinates for receive locations. Accordingly, grant of those applications will be made subject to an appropriate condition. We find that the applicant is fully qualified to construct and operate as proposed and that a grant would serve the public interest, convenience, and necessity.

16. Accordingly, IT IS ORDERED, That the informal objections filed by the Microband Corporation of America ARE DENIED.

17. IT IS FURTHER ORDERED, That the applications of the Public Broadcasting Service to operate Instructional Television Fixed Service stations, listed in the attached Appendix, ARE GRANTED, subject to the condition that within 90 days of the release of this document, PBS submit the geographic coordinates for those receive locations specified in applications filed March 8, 1982 through June 25, 1982.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment

APPENDIX

PUBLIC BROADCASTING SERVICE APPLICATIONS PAGE 1

FILE NUMBER	LOCATION	
BPIF 820113MB	SEATTLE	WA
BPIF 820113MD	SPOKANE	WA
BPIF 820113ME	INDIANAPOLIS	IN
BPIF 820113MF	KANSAS CITY	MO
BPIF 820113MG	COLUMBUS	OH
BPIF 820113MH	MEMPHIS	TN
BPIF 820113MI	DENVER	CO
BPIF 820113MJ	CHARLOTTE	NC
BPIF 820113MK	ORLANDO	FL
BPIF 820125MF	DAYTON	OH
BPIF 820125MH	HOUSTON	TX
BPIF 820125MI	NORFOLK	VA
BPIF 820125MJ	HUNTINGTON	WV
BPIF 820129MM	JACKSONVILLE	FL
BPIF 820129MN	MILWAUKEE	WI
BPIF 820129MO	PORTLAND	OR
BPIF 820129MP	ROANOKE	VA
BPIF 820208ML	BETHLEHEM	PA
BPIF 820208MM	CHATTONOOGA	TN
BPIF 820208MN	FLINT	MI
BPIF 820208MO	ALLENDALE	MI
BPIF 820208MP	LEXINGTON	KY
BPIF 820208MQ	PHILADELPHIA	PA
BPIF 820208MR	TOLEDO	OH
BPIF 820216MB	ALBUQUERQUE	NM
BPIF 820216MC	NASHVILLE	TN
BPIF 820216MD	PENSACOLA	FL
BPIF 820216ME	SPRINGFIELD	MO
BPIF 820216MF	LIVERPOOL	NY
BPIF 820222MI	LITTLE ROCK	AR
BPIF 820222MJ	DES MOINES	IA
BPIF 820222MK	WICHITA	KS
BPIF 820222ML	OKLAHOMA CITY	OK
BPIF 820302ME	BOISE	ID
BPIF 820302MF	CEDAR RAPIDS	IA
BPIF 820302MG	COUNCIL BLUFFS	IA
BPIF 820302MH	ERIE	PA
BPIF 820302MI	MADISON	WI
BPIF 820302MK	TOPEKA	KS
BPIF 820308MB	CARBONDALE	IL
BPIF 820308MD	CORPUS CHRISTI	TX
BPIF 820308ME	DULUTH	MN
BPIF 820308MF	MUNCIE	IN
BPIF 820308MG	REDDING	CA

PUBLIC BROADCASTING SERVICE APPLICATIONS PAGE 2

FILE NUMBER	LOCATION	
BPIF 820316MJ	BURLINGTON	VT
BPIF 820316MK	COLORADO SPRINGS	CO
BPIF 820316ML	LANSING/E. LANSING	MI
BPIF 820316MN	FAIRBANKS	AK
BPIF 820316MO	GAINESVILLE	FL
BPIF 820316MP	GREEN BAY	WI
BPIF 820316MQ	JACKSON	MS
BPIF 820316MR	LA CRESENT	MN
BPIF 820316MS	LUBBOCK	TX
BPIF 820316MT	PROVIDENCE	RI
BPIF 820316MU	PUEBLO	CO
BPIF 820316MV	WAUSAU	WI
BPIF 820324MH	AUSTIN	TX
BPIF 820324MJ	EVANSVILLE	IN
BPIF 820324MM	MEDFORD	OR
BPIF 820324MN	OXFORD	OH
BPIF 820324MO	POCATELLO	ID
BPIF 820324MP	NEW SCOTLAND	NY
BPIF 820402MA	YAKIMA	WA
BPIF 820402MB	ST. LOUIS	MO
BPIF 820402MC	SHREVEPORT	LA
BPIF 820402MD	RALEIGH	NC
BPIF 820402ME	CHILTON	WI
BPIF 820402MF	MONTGOMERY	AL
BPIF 820402MG	MONROE	LA
BPIF 820402MH	LAKE CHARLES	LA
BPIF 820402MI	LAFAYETTE	LA
BPIF 820402MK	GREENVILLE	NC
BPIF 820402MO	BATON ROUGE	LA
BPIF 820402MP	ASHVILLE	NC
BPIF 820402MQ	ALEXANDRIA	LA
BPIF 820623MK	BEMIDJI	MN
BPIF 820623ML	EL PASO	TX
BPIF 820623MM	FARGO	ND
BPIF 820623MN	PADUCAH	KY
BPIF 820623MO	SALT LAKE CITY	UT
BPIF 820625MG	SIOUX CITY	IA
BPIF 820625MH	URBANA	IL

Common Carrier Rates, Integration
Common Carrier Rates, Integration of Rates
Common Carrier Rates, Rates, Integration

Commission initiated a *Notice of Inquiry* into the appropriateness of the existing rate integration policies for Alaska, Hawaii, Puerto Rico, and the Virgin Islands in light of recent Commission actions authorizing competitive entry to these points for interstate telecommunication services.
- Rate Integration Policies
CC Docket 83–1376

FCC 83–606

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands	RM 4436
Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands	CC Docket No. 83–1376

NOTICE OF INQUIRY

(Adopted December 22, 1983 Released January 4, 1984)

BY THE COMMISSION:

I. Background

1. The Commission has before it a Petition for Rulemaking filed by the State of Alaska and the Alaska Public Utilities Commission (hereinafter jointly referred to as Alaska) on April 11, 1983. The Petition requests the initiation of a rulemaking proceeding to establish a permanent mechanism for the integration of rates and services between the contiguous states and Alaska, Hawaii, Puerto

Rico and the Virgin Islands (the noncontiguous points). The State of Hawaii, Alascom, Inc. (Alascom),[1] and General Communications Incorporated (GCI)[2] filed comments in response to the Petition. Alascom replied to the GCI comments. A letter from Senator Ted Stevens supporting the initiation of a rulemaking proceeding to develop long-term policies for rate integration and competition in the post-divestiture era[3] was included in the record.[4]

2. In support of the Petition, Alaska submits that rate integration is dependent primarily upon agreements between AT&T and carriers serving the noncontiguous points and that the separate interim agreements between Hawaiian Telephone Company and Alascom and AT&T expire January 1, 1985, after which settlements will be based on the *Separations Manual* which is incorporated as Part 67 of the Commission's Rules, 47 C.F.R. Section 67.1. Alaska further contends that the implementation of access charges, *MTS-WATS Market Structure Inquiry (Phase I)*, 48 Fed. Reg. 10319 (March 11, 1983), *recon.*, 48 Fed. Reg. 42984 (September 21, 1983), *appeal pending sub nom. NARUC v. FCC*, Civ. No. 83–1225 (filed March 1, 1983), and the exchange plant separations proceeding, *Amendment of Part 67*, mimeo no. 6726 (released September 26, 1983), *modified in part*, FCC 83–564 (adopted December 1, 1983), will alter significantly the foundation on which settlements are based, thereby undermining the rate integration process. Alaska states that AT&T settlements with the noncontiguous carriers have generally amounted to more than the revenues generated by calls from those areas. Because noncontiguous points typically have high cost exchange and interexchange facilities, Alaska contends that rate integration cannot be maintained without some form of modified interstate rate averaging or other substantial support for both types of facility costs. While the access charge decision will provide support for nontraffic sensitive (NTS) costs, high traffic sensitive exchange costs will be passed on to the interexchange carrier who will recover them from

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[1] Alascom is the traditional carrier in Alaska, offering both interstate and intrastate telecommunication services. It and the American Telephone and Telegraph Company (AT&T) currently offer the interstate services at integrated rates pursuant to Commission direction.

[2] GCI is a new competitive entrant in the interstate telecommunications market, offering service to Anchorage, Alaska, via satellite facilities there and in Seattle, Washington. It leases transponders, and utilizes ENFIA facilities, WATS or private line services obtained from AT&T to reach the called destination in the contiguous states.

[3] The divestiture by AT&T of the Bell Operating Companies pursuant to the Modification of Final Judgment entered in United States v. Am. Tel. and Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), *cert. denied sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[4] On December 7, 1983, GCI filed a Petition for Expedited Consideration and Related Interim Relief. Comment was requested by Public Notice released December 9, 1983.

the interstate user. In its view, this will increase rates to noncontiguous points or discourage service to those points. Additionally, Alaska asserts that there is now no mechanism to support high cost interexchange facilities since AT&T's agreement to pay a transitional supplement ends on December 31, 1984, after which settlements will be based on interstate costs assigned by the *Separations Manual*. Alaska believes that absent substantial support from all ratepayers benefitting from the extension of interstate services to Alaskan points, rate integration may collapse. The support necessary is, in Alaska's view, not a significant percentage when compared to total toll revenues. While not proposing a specific mechanism, Alaska suggests that the high costs could be supported by a fund similar to the universal service fund and funded through the carrier common line rate element. It submits that payment from such a fund could be made to all carriers that provide service to the noncontiguous points under integrated rate structures, with payments being proportionate to traffic volumes and cost factors.

3. Hawaii states in supporting the objectives of the Alaska Petition that there is a compelling need for a mechanism to assure that rate integration is implemented. It asserts that services to noncontiguous points have been more expensive than comparable services between other points, thereby adversely affecting the residents of the noncontiguous points and those wishing to communicate with them. Hawaii submits that the universal service fund does not redress the problems associated with high cost, traffic sensitive exchange facilities or high cost interexchange facilities. Hawaii suggests that elimination of the interstate settlements pool and introduction of competition may cause carriers to be reluctant to honor their commitments to rate integration despite the clear directives of the Commission. The goals of Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. Section 151, will be furthered, in Hawaii's view, if revised integration procedures are developed.

4. GCI, in supporting the Alaska Petition, submits that the changes in the telecommunication industry will not destroy rate integration, but represent an increasing incongruity between the competitive policies and the existing mechanism for rate integration. For the public to receive the benefits of both policies, it asserts that rate integration must be restructured. It believes that some support to Alaska is necessary if universal service is to be achieved. However, it argues that if only one carrier is to receive support, competitive service in the Alaskan market will be frustrated. Therefore, GCI contends that the mechanism providing rate support must allow for participation by all carriers serving routes requiring support.

5. Alascom supports the initiation of a proceeding to ensure that rate integration will not be jeopardized as reliance on marketplace forces increases. Alascom states that it knows of no reason why it is

not entitled to continue to recover its full interstate MTS-WATS costs from AT&T by means of settlements based on applicable separations procedures and negotiated arrangements. Alascom suggests that if the Commission does not wish to have AT&T continue to be the sole contributor to the support of services to high-cost noncontiguous points, a supplemental Alaskan interstate separations allocation that would become part of a universal service fund could be established. Such a fund could also, in Alascom's view, include above average NTS and exchange carriers' traffic sensitive costs, thus spreading the cost of supporting these high cost areas among all interstate exchange carriers at a minimum cost to the nation as a whole. Alascom does not believe, as highlighted in its reply comments to GCI's comments, that competitive providers should be compensated from such a fund since that would encourage uneconomic duplication of facilities. It says that users who already support facilities to provide service to high cost areas would have to pay the cost of such facilities. A competitive policy assertedly does not require subsidy of carriers competing with the carrier of last resort since that would create perverse incentives, would undermine the discipline that competition provides and would do nothing to further universal service. Alascom argues that if GCI cannot compete at cost-based rates, it should terminate service.

II. Existing Policy

6. AT&T and the independent telephone companies have long used a uniform rate schedule based upon averaged costs and rates for most interstate services among points in the contiguous states and the District of Columbia. Revenues from those services were traditionally divided in accordance with a formula that compensated each participating carrier for its interstate expenses and provided each carrier with the same return on its interstate investment. The interstate expense and investment was computed in accordance with the *Separations Manual* that is used for purposes of jurisdictional separations (*i.e.*, through division of revenues and settlements contracts agreed to by the participating carriers). Different procedures were used for purposes of computing settlements and interstate rates between domestic points and noncontiguous states, territories, and possessions. Those procedures historically resulted in rates to and from noncontiguous points that were higher than interstate rates for comparable distances within the contiguous states.

7. In the early 1970's this Commission adopted a rate integration policy for interstate MTS-WATS service between Alaska, Hawaii and Puerto Rico and the contiguous states. *Establishment of Domestic Communications Satellite Facilities*, 35 FCC 2d 844, 856 (1972) (*Domsat II*), *aff'd on recon.*, 38 FCC 2d 665 (1972), *aff'd sub nom.* Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975). Rate

integration was not adopted for private line offerings, as they were considered to be specialized in character. The Virgin Islands was subsequently included within the rate integration policy.

8. When rate integration is discussed, there are, in fact, two subelements involved. The first, and the most obvious to users of telecommunications services, is the averaged rates charged which may not necessarily relate to the underlying costs of providing the service. The averaging implicit in the procedure has been justified on the grounds that no person should be deprived of telecommunications service at reasonable rates simply because of the high costs associated with serving the user's location. Full rate integration was to be achieved through phased reductions in tariffed rates. *Integration of Rates and Services*, 61 FCC 2d 380 (1976), *recon. denied*, 65 FCC 2d 234 (1977). Rates were fully integrated between Puerto Rico and the Virgin Islands on July 1, 1980. *Integration of Rates and Services*, 72 FCC 2d 715 (1979). The final step in the rate integration process for Alaska and Hawaii was scheduled to be accomplished on January 1, 1985. *Integration of Rates and Services*, 87 FCC 2d 25 (1981). On October 3, 1983, AT&T filed revised interstate tariffs that would have integrated Alaskan and Hawaiian MTS-WATS rates on January 1, 1984. These rates were suspended for investigation until April 3, 1984. *Investigation of Access and Divestiture Related Tariffs*, FCC 83–470 (released October 19, 1983).

9. The second factor in rate integration is the settlement arrangements between carriers serving the noncontiguous points and AT&T. It is this process through which carriers settle the differences between the amounts each collects from end users and the amount to which that carrier is entitled for providing its part of the service offering. These agreements in the past have been negotiated between carriers on an individual basis. AT&T and carriers serving the noncontiguous points have entered into new settlement arrangements that follow the traditional pattern in the contiguous states. Carriers that serve the noncontiguous points will recover all expenses apportioned to the interstate jurisdiction and a return on interstate investment equal to the rate earned by the settlements pool as a whole. The settlement agreements with Alascom and Hawaiian Telephone provide certain supplemental payments to those carriers through 1984.[5] This Commission has determined that the same *Separations Manual* provisions that are used to identify interstate investment and expenses in the contiguous states should be used for all noncontiguous points, *Integration of*

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[5] The assertion by Alaska that the settlements agreements will expire on January 1, 1985, is incorrect. It is only the transitional supplements that Alascom and Hawaiian Telephone have been receiving that will terminate on that date. The settlements agreements will, however, have to be modified to reflect the adoption of access charges for the exchange portion of telephone services.

Rates and Services, 87 FCC 2d 18 (1981), and *Integration of Rates and Services*, 72 FCC 2d 699 (1979).

10. We have taken several actions recently that have opened the noncontiguous points to competitive entry, thereby bringing them the benefits that competition provides for the marketplace. The noncontiguous points of Hawaii, Puerto Rico and the Virgin Islands were opened to competition in 1980. *MTS-WATS Market Structure Inquiry*, 81 FCC 2d 177 (1980). The Alaskan interstate MTS-WATS market, with a limited exception prohibiting duplicative facilities to bush communities, was opened to competitive entry in 1982. *MTS-WATS Market Structure Inquiry (Phase II)*, 92 FCC 2d 787 (1982), *recon. denied*, FCC 83–213 (released May 9, 1983). Finally, we have promoted marketplace competition with the noncontiguous points by extending the dominant/nondominant and forbearance policies applicable to the contiguous states to the noncontiguous points. *Competitive Carrier Rulemaking (Fourth Report and Order)*, FCC 83–481 (released November 2, 1983).

11. Our recent decision to establish a system of interstate access charges will substantially alter the traditional system of settlements and division of revenues within the contiguous states that has been used as a model for settlements between AT&T and carriers that serve the noncontiguous points. The telephone companies that serve the noncontiguous states are primarily exchange carriers and will be receiving most of their compensation for participation in interstate services through access charges. Settlement arrangements will, however, still be required (at least in the near term) between AT&T and independent telephone companies owning facilities that are classified as interexchange for purposes of the access charge rules.

III. Discussion

12. Our effort to bring telecommunication services to the noncontiguous points at rates comparable to those in the contiguous states has a long history. The pleadings before us suggest that just as we are achieving the culmination of rate integration, the competitive policies advanced in more recent years may adversely effect the future utility of existing rate integration procedures. While the pleadings express a need for a proceeding to investigate the interrelationships between rate integration and competition for the future telecommunication policies for the noncontiguous points, there is a decided lack of specificity concerning the nature or breadth of the problems perceived or the solutions proffered to alleviate them. Moreover, there is disagreement concerning the integration policy that would be compatible with competition.

13. The record developed in connection with Alaska's Petition is inadequate for us to make a recommendation of any rule changes at this time. Accordingly, we will not initiate a Notice of Proposed Rulemaking. However, we conclude that the public interest will be

served if we begin a rulemaking proceeding to evaluate the rate integration policy and associated settlement arrangements in the light of more recent developments. This will give interested persons an opportunity to provide detailed support for the generalized assertions contained in the pleadings associated with the Alaska Petition.

14. Questions of competitive equity did not arise before carriers with their own facilities entered these markets in competition with the existing carriers. Moreover, as long as the competitive entrants' share of the market in the contiguous states was very small, the settlement procedures accomodated rate integration without significantly distorting competition. The increased levels of competition in the contiguous states and entry of competitors owning facilities in the noncontiguous points raises questions of the viability of competition under the existing rate integration procedures. To provide some focus for parties interested in commenting in this Docket, we shall outline several issues on which we seek comment. In doing so, we do not imply that these are the only issues that could be delineated, or that alternative formulations could not be posited. The focus of our discussion is on the potential long-run implications of maintaining our policies favoring both competition and rate integration, and on adjustments which may be necessary to reconcile those policies.[6]

15. Participants in this proceeding are requested to comment on the degree to which competition and the existing rate integration policies are believed to be incompatible. Any participant believing them to be incompatible should describe factors that lead to this incompatibility. In setting forth the factors, participants should be as specific as possible as to the interrelationships that exist and should identify the policies that will be affected by competitive entry. The identification of the factors causing the alleged incompatibilities is extremely important because it will permit the development of modified policies that specifically address the problems defined by the comments. To the extent that these factors impose additional financial burdens on carriers or customers, delineation of the specific costs involved should be provided. The provision of dollar amounts will be particularly helpful if the record discloses that modifications in the existing policies are necessary.

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[6] GCI argues in its Petition (*See* Note 4, *supra*), essentially, that the outcome of this proceeding will be academic because its viability as a competitor is significantly affected by the tariffs which are presently scheduled to become effective next April 3. We expect to address GCI's Petition and the responses thereto next month. It may be necessary for AT&T and GCI (as well as other facilities-based providers of service to noncontiguous points) to enter into some type of interim arrangements. Any such relief would have to be structured so as to have the least possible impact on the competitive environment and should be consistent with the long-run options. Interested persons should prepare themselves to move quickly on this matter, and are encouraged to meet upon this matter soon to begin mapping out what accommodations may be feasible should we rule favorably on GCI's Petition.

16. Participants are requested to submit proposals for modifying existing policies to account for the factors identified in response to the preceding paragraph. Any proposal should specifically identify those Commission policies or carrier practices that must be modified, including any changes in tariffs or settlement arrangements that may be required.[7] The dollar impacts of any changes should be provided if it is possible to do so. Comment is also sought on whether the modifications proposed will have different effects depending on the noncontiguous point to which they are applied. If so, to what extent will different policies be necessary for different noncontiguous points? Would different policies create unreasonable discrimination between points in violation of Section 202(a) of the Communications Act, 47 U.S.C. Section 202(a)? Participants should also comment on the impact any proposed plan would have on the provision of competitive telecommunication services throughout the entire domestic market (including service both to contiguous and noncontiguous points). If existing policies or practices are to be modified, we intend to select those modifications which have the least impact on competition wherever possible, consistent with the achievement of other Commission policies.

17. A critical factor in developing policies and rules for a competitive environment for the noncontiguous points is an evaluation of the characteristics possessed by the various interstate, interexchange carriers serving those markets. The determination of the characteristics of the carriers entering these markets is easier than identifying those of the existing carriers in these markets. The new entrant may rely totally on the resale of other carriers' facilities, may have its own facilities in the noncontiguous point and resell another carrier's facilities in the contiguous states (*e.g.*, as GCI does in its offerings in Alaska), or may have a substantial network in the contiguous states and enter the noncontiguous point either via its own facilities or through the resale of a carrier's facilities in the noncontiguous point.

18. There appear to be two approaches to characterizing the carriers that have traditionally served such markets. The first is to consider those carriers as partners with AT&T and view the offering as a joint competitive offering. This view is based on the requirement that AT&T join with such a carrier in offering service at integrated rates. *Domsat II*, *supra*. The second is to view a carrier such as Alascom as facility-based in its particular service area and as a

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[7] Participants may also suggest changes in separations rules if they believe such changes are necessary or desirable in order to develop a viable long-run policy. We will not, of course, adopt any separations changes in this Docket. Any change in separations rules would require an initial decision of a Federal-State Joint Board pursuant to Section 410(c) of the Act, 47 U.S.C. Section 410(c). If separations changes are suggested in this Docket that appear to warrant consideration, we will refer such questions to a Joint Board.

reseller with respect to the contiguous states. This view is premised on the fact that such a carrier owns only those facilities in it service area and relies on the facilities of other carriers to complete its interstate offerings. The decision as to which characterization to apply to these carriers may significantly affect the ultimate market structure and applicable rules.

19. Under a joint venture theory, a competitive entrant would be competing with the average costs associated with the joint offering. A new entrant presumably would enter only if it could offer service at a cost lower than the average cost of the joint venture. This could create a barrier to entry since an entrant could also be expected to incur somewhat higher costs—absent a significant technological breakthrough. Therefore, we seek comment on whether the obligations on AT&T and carriers such as Alascom should be altered in any way to provide a more workable competitive environment. If so, what changes are necessary? Can there in fact be an obligation imposed on two carriers to provide service at integrated rates without considering them to be a partnership for purposes of determining a competitive policy?

20. The facility-based/resale characterization would appear to require considerably greater modifications in existing practices than might the joint venture characterization. We seek comment on the implications of the facility-based/resale characterization for existing policies and practices. How would we determine equitable mechanisms to compensate for the fact that the original carrier has an obligation to serve all points, while the entering carrier is under no such obligation? Would the result be an administered price system? If so, will the benefits of competition actually be achieved?

21. In analyzing these options, participants should address the degree of competition possible under each approach. Particular attention should be paid to whether support payments can be minimized if one characterization is adopted over another. What factors should we consider in making such a comparison and what weight should be assigned to each factor?

22. The premise underlying Alaska's Petition appears to be that since the high-cost noncontiguous points currently receive support from the contiguous states, a modified rate integration plan or some other mechanism must be in place to ensure that carriers will continue to serve these points in a competitive environment. GCI, in commenting on Alaska's Petition, argues that if support is provided to the incumbent carrier, the competitive entrant must receive support in order to afford the entrant an opportunity to compete. Does the answer to the question of whether a support payment should be made to a competitive entrant depend on which characterization of the existing carrier is selected? Is such a policy consistent with a competitive marketplace? If a policy allowing a competitive entrant to receive support payments through some mechanism were

to be adopted, what impact would this have on the overall level of support payments required for a particular point? If demand were stimulated by entry, would it not be possible that the support amount would increase? Would competitors in all noncontiguous points require support payments? What protections could a plan contain that would ensure that the competition-based incentives to control costs are attained? If such controls cannot be developed, would it be better to adopt a policy that did not provide support to competitive entrants at all, thereby possibly limiting the support payments required from ratepayers in the contiguous states?

23. The existing policy imposes the requirement for supporting the high-cost noncontiguous points upon services provided by AT&T and its partners in the interstate settlements pool. While the implementation of access charges will spread some of this support over all carriers utilizing the exchange facilities, the majority of support is required because of high interexchange costs. Alascom suggests that in a competitive environment it may not be equitable, or even viable, to continue to impose any obligation for supporting service to such points on one group of competitive carriers. If this is the case, what mechanism should be used to spread the costs of supporting service to such points? Participants who favor alternative mechanisms should describe in detail how many mechanism they propose would work, and what existing procedures would have to be changed.

24. Several parties' comments have suggested that a universal service fund approach be taken to providing support to the high-cost noncontiguous points.[8] Would this method be workable? At what point in the process would the costs be spread among services of the various carriers? Would the spreading be equitable, or would it result in uneven distribution of the costs among carriers? Is there a different mechanism that would be more efficient, or cause less competitive impact?

25. Several comments suggest that the changes to the exchange allocations in the *Separations Manual* and the adoption of access charges will adversely affect rate integration. Exchange carriers are part of the National Exchange Carrier Association which provides a mechanism for achieving partially averaged access tariff rates and compensation for exchange carrier costs that are assigned to the interstate jurisdiction by the *Separations Manual*. While we believe that the principal area in which possible concerns exist is in the interexchange area, participants who believe that access charges or *Separations Manual* changes will have an adverse impact on

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[8] Such a universal service fund would be different than that adopted by the Joint Board in CC Docket No. 80–286. That fund was intended to spread certain high cost nontraffic sensitive costs among all users of telecommunication service. The suggested universal service fund would relate only to some unspecified high interexchange costs.

integration policies should feel free to present their positions in their comments. Such participants should describe the adverse effects they anticipate and the size of any perceived impacts. We believe that our decisions in these areas have carefully taken into account the impacts on high cost areas, thereby obviating any significant impact.

26. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1,4(i) and (j), 201–205 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i) and (j), 201–205 and 403, and Section 553 of the Administrative Procedures Act, 5 U.S.C. 553, That this *Notice of Inquiry* IS HEREBY INITIATED.

27. IT IS FURTHER ORDERED, That comments shall be filed on or before March 7, 1984. Reply comments shall be filed on or before April 6, 1984. Comments shall be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. All comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M. Street, NW, Washington, D.C.

28. IT IS FURTHER ORDERED, That the Petition for Rulemaking filed by the State of Alaska and the Alaska Public Utilities Commission IS GRANTED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Control, Concentration of, Regional
Ownership Multiple
Ownership of Stations, Limitations on

Commission proposed to eliminate or relax the regional concentration of control provisions of Sections 73.35 (b) (1), 73.240 (a) (2), and 73.636 (a) (2) of the rules in view of the inconsistent and anomalous results produced by the present rule. Moreover, the significant growth in media outlets in recent years strongly suggests a need to reexamine the assumptions underlying regional concentration limitations in general.

- *Regional Concentration of Control*

FCC 84–10

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules	MM Docket No. 84–19 RM-4564

NOTICE OF PROPOSED RULE MAKING

(Adopted: January 12, 1984 Released: January 17, 1984)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

Introduction

1. Before the Commission is a petition for rule making filed by the National Association of Broadcasters ("NAB"), seeking repeal of the "regional concentration of control" provisions of Sections 73.35(b)(1), 73.240(a)(2), and 73.636(a)(2) of the Commission's Rules.[1] These sections, which are identical, prohibit any party from directly or indirectly owning, operating, or controlling three commercial AM, FM, or television stations where any two stations are located within 100 miles of the third, and where there is primary service contour overlap between any of the stations.[2] The rule provides for two exceptions. First, AM-FM combinations may be considered as one

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[1] Public notice of the petition was given August 19, 1983, Report No. 1421, Mimeo No. 6028. Eight parties filed comments in response to this notice and are listed in Appendix A. No reply comments were filed.

[2] The term "primary service contour" refers to the predicted or measured 0.5 mV/m contour for AM stations, the predicted 1.0 mV/m contour for FM stations, and the

station if their communities of license meet certain geographical criteria. Second, applications raising regional concentration issues based on contour overlaps involving UHF television stations are treated on a case-by-case basis.[3]

2. Based upon our review of the petition, the comments filed in response thereto and our own experience in administering the rule, we believe that the commencement of a rule making proceeding is warranted to determine whether the existing regional concentration provisions should be repealed. We are particularly concerned that our regional ownership rules inadequately reflect the significant changes in the telecommunications marketplace that have occurred in recent years.

Background

3. The three-station regional concentration of control rule is the Commission's most recent multiple ownership provision. In the past, as the Commission developed fixed limits on the number of stations that a party could control on a national basis, there was a belief by the Commission that the common ownership, operation, or control of a smaller number of stations in close proximity to one another or in a small geographic area may precipitate a concentration of control contrary to the public interest.[4] Accordingly, when the Commission adopted its "seven station rule" limiting common ownership, operation, or control to no more than 7 AM, 7 FM, and 7 television stations (of which only 5 may be VHF), the Commission also set forth specific factors for determining, on a case-by-case basis, whether a particular regional ownership pattern would constitute an undue concentration of control. Specifically, Sections 73.35(b), 73.240(a)(2), and 73.636(a)(2) of the Rules provided that:

> In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question.[5]

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predicted Grade B contour for TV stations, computed in accordance with Sections 73.183, 73.186, 73.313, and 73.684 of the Commission's Rules.

[3] *See* Note 11 to Sections 73.35, 73.240, and 73.636 of the Commission's Rules. The full text of the rule, as applied to each broadcast service, is attached as Appendix B.

[4] For example, in 1941, the Commission adopted Section 4.226 of the Rules permitting the common ownership of a maximum of three "experimental" television stations. However, the rule also stated that "no person . . . shall, directly or indirectly, own, operate, or control more than one television station except upon a showing . . . that such ownership, operation, or control would not result in the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity. . . ." 6 Fed. Reg. 2282, 2284–85 (1941).

[5] *Report and Order* in Docket No. 8967, 18 FCC 288, 296–297 (1953).

The authority to make these case-by-case determinations was delegated to the Chief of the Broadcast Bureau, except for cases involving the "acquisition of a third broadcast station within 100 miles of a presently owned station," which were referred to the Commission, *en banc*, for consideration. *See Order*, 43 FCC 2d 638, 639 (1973).

4. This case-by-case approach proved to be burdensome to applicants who found themselves conducting extensive media surveys to disprove the possibility that grant of an application would result in a regional concentration of control contrary to the public interest. It also led to a lack of predictability because, even though most applications raising regional concentration issues were granted, applicants were nevertheless unsure as to the significance of each of the factors weighed by the Commission. *See, e.g., Clarksburg Publishing Company v. FCC*, 225 F.2d 511 (D.C. Cir. 1955); *Wichita-Hutchinson Co., Inc.*, 17 R.R. 2d 1235 (1969); and *Forum Communications Co.*, 34 R.R. 2d 1163 (1975).[6] As a result, the Commission decided, upon its own motion, to issue a *Notice of Proposed Rule Making* in Docket No. 20548, 54 FCC 2d 331 (1975), looking toward the establishment of a "fixed" regional concentration standard in lieu of the case-by-case approach. The *Notice* proposed as its primary option to prohibit the acquisition of a fifth commonly owned broadcast facility within any single state.

5. After reviewing the comments in Docket No. 20548, the Commission abandoned its proposed limitation of four stations per state because it was clearly shown that such a rule would be inequitable in the larger states while not actually preventing the development of regional concentrations of control in "cluster areas" between states. *First Report and Order* in Docket No. 20548, 63 FCC 2d 824, 827–28 (1977). Instead, the Commission adopted the present rule prohibiting the acquisition of a station or the modification of facilities if this would result in the common ownership of three broadcast stations where any two are within 100 miles of the third, and where there is primary service contour overlap between any of the stations. The Commission based this rule upon a review of all recent applications where concentration of control issues were raised by the staff and referred to the Commission, *en banc*, for determina-

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[6] For example, the presence of a substantial number of other media services was a significant factor in the *Forum* case in which the Commission granted an application for a construction permit for a satellite television station in Pierre, South Dakota, even though the grant resulted in the common ownership of a fifth VHF television station and a seventh broadcast station in a contiguous two state area. However, in the *Wichita-Hutchinson* case, the Commission denied an application for the transfer of control of a VHF television station in Hutchinson, Kansas, which would have resulted in the transferee's controlling four television stations in a three state area, as well as newspaper interests in one of these states, even though there were two other VHF television stations and 25 AM and FM stations serving the Wichita-Hutchinson market.

tion. This review revealed that "the probability that a concentration of control will result where there is no overlap of the primary service contours of the commonly owned stations is too unlikely to require extensive showings from applicants in such cases."[7] Accordingly, the Commission decided that, generally, it would not raise regional concentration issues unless both the "overlap" and "distance" factors were present. However, the Commission reserved the right to request concentration showings "where specific allegations of fact coming to the Commission's attention, or other substantial and material questions of fact noticed by the Commission, raise the possibility that a grant of an application would create a concentration of control and be inconsistent with the public interest."[8]

6. The Commission subsequently modified the *First Report and Order* in Docket No. 20548 to provide for ad hoc consideration of regional concentration issues involving UHF television stations and to clarify its single market AM-FM combination exception to the rule. *See Memorandum Opinion and Order* in Docket No. 20548, 67 FCC 2d 54, 57–58 (1977). A petition for partial reconsideration or clarification of the *Memorandum Opinion and Order*, filed by Great Trails Broadcasting Corporation, is still pending, along with responsive pleadings filed by Group One Broadcasting Co. and Lares Broadcasting Corporation. To the extent still relevant, these pleadings are incorporated and will be considered in this proceeding.[9]

NAB's Petition

7. NAB believes that the existing regional concentration rule is arbitrary and that subsequent developments in the telecommunications marketplace have rendered it obsolete. Specifically, NAB contends that the rule has been applied mechanically without regard

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[7] *First Report and Order* in Docket No. 20548, 63 FCC 2d 824, 828 (1977).

[8] *Id.*

[9] Great Trails argues that commonly owned AM and FM stations should be considered in the same "market" and counted as one station for purposes of the regional concentration rule based on the contour encompassment standards used in the Commission's "one-to-a-market" rules rather than on the "15 mile/urbanized area" criteria adopted in the *Memorandum Opinion and Order*. Great Trails also contends that the Commission should permit reasonable improvements of facilities by stations that are "grandfathered" under the rule. In this latter regard, we note that Congress recently amended Section 310 of the Communications Act to permit facilities improvements by such "grandfathered" stations and that this aspect of Great Trails' request would appear therefore to be moot. *See* Act of December 8, 1983, Pub. L. 98–214, § 7. It should be emphasized that this amendment is intended to permit changes in transmitter location, antenna height, or power but not changes in frequency or class of station. Moreover, the Committee stated in its report that "this section addresses an exception to existing Commission rules and does not express any intent with respect to the ability of the Commission to revise or modify these rules." H.R. Rep. No. 98–356, 98th Cong., 1st Sess. (1983) at 19.

to the diversity of voices or programming in any given region, with the adverse effect of precluding station acquisitions and improvements in facilities that would otherwise serve the public interest. For example, it notes that in the recent case of *Tri-State Broadcasting, Inc.*, 52 R.R. 2d 1013 (1982), the Commission strictly applied the rule to block the transfer of control of a radio station without regard to the *de minimis* nature of the contour overlap involved. Generally, NAB suggests that "a review of the current rule might well disclose that in the vast majority of cases there is no more danger of concentration of control inimical to the public interest where there is overlap than where there is not."[10]

8. NAB also asserts that the remedy is not to return to the burdensome case-by-case approach but rather to determine, in the context of a rule making, whether any regional concentration restraints are necessary in light of the increasing competition within the telecommunications marketplace. In this regard, NAB points out that by 1977, the year in which the current rule was adopted, there were 8,505 authorized radio stations (4,536 AM and 3,969 FM) and 1,029 television stations, but that as of January 1, 1983, there were 9,798 radio stations (4,828 AM and 4,970 FM) and 1,276 television stations.[11] NAB states that this represents increases of 15.2% and 24.0% in the number of radio and television stations, respectively, over the past six years. NAB believes that this dramatic increase in the number of broadcast voices is merely one of the new developments that has rendered the rule unnecessary. Equally significant, according to NAB, is the growth and authorization of new nonbroadcast media delivery systems. For example, NAB notes that, in 1977, there were 3,832 cable television systems serving 11,900,000 subscribers, and that, in 1982, there were almost 1,000 more systems serving approximately 21,000,000 subscribers.[12] Additionally, NAB states that:

> [In] 1983, there are . . . at least 99 multipoint distribution services with 564,655 subscribers; 206 operating low power television stations and at least 8,500 pending applications for new ones; [and] eight entities authorized to begin providing Direct Broadcast Satellite Service . . . [13]

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[10] NAB Petition for Rule Making at 5.

[11] NAB's source for these statistics is the *Broadcasting/Cablecasting Yearbook*, 1983 edition, at B-384. As of November 30, 1983, Commission records show 10,112 authorized radio stations (4,891 AM and 5,221 FM) and 1,407 authorized TV stations.

[12] For figures about cable television, NAB relies upon *Television Factbook*, 1981–82 edition, at 83-a. The 1982–83 edition of the *Television Factbook* indicates that there were 25 million cable subscribers and 5,600 systems as of January 1, 1983. *Id.* at 1560.

[13] NAB Petition for Rule Making at 7. NAB bases these figures upon its own publication, *Profile: Broadcasting 1983*, as well as upon FCC sources.

As a result of these significant developments, NAB believes that regional concentration limitations are no longer necessary to promote competition and diversity of voices and program sources because these goals are already being accomplished by the marketplace.

9. NAB also contends that repeal of the regional concentration rule would result in several public interest benefits. NAB believes that it would enable broadcasters in marginal economic situations, such as in rural areas, to benefit from the economies of scale of limited multiple ownership and, thus, could result in the activation of some unused channels and frequencies currently considered as too great an economic risk. Additionally, NAB believes that the Commission would be freed of the burden of adjudicating requests for waiver and could utilize its resources in other more important areas. Moreover, repeal of the rule would, according to NAB, have the beneficial effect of promoting diversity of voices and competition by removing a restriction that only applies to commercial broadcasters and not to other media competitors. Finally, NAB asserts that repeal of the rule could benefit new, smaller-scale entrants to the broadcast industry and could result in increased minority ownership of broadcast stations.

10. NAB does not contend "that there might never be legitimate concerns about undue regional concentration." It does argue, however, that regulatory intervention is not required to redress such situations. Rather, it believes that the Commission should "leave what regulation proved to be necessary to the antitrust laws and to the marketplace itself, the natural regulator of program diversity and operation in the public interest." NAB Petition at 10.

Comments

11. With one exception, the commenting parties support NAB's petition seeking repeal of the three-station regional concentration rule. Generally, these parties reiterate NAB's arguments that the arbitrary application of the rule has prevented station acquisitions and improvements in facilities, and that changes in the telecommunications marketplace have rendered the rule unnecessary. With respect to the arbitrariness of the rule, there is a clear consensus that the rule is applied without regard to diversity of programming or concerns about oligopolistic control of the media which prompted promulgation of the rule in the first place. As examples of this, Great Trails Broadcasting Corporation ("Great Trails") points out that in the case of *Radio Soo, Inc.*, 50 R.R. 2d 373 (1981), the acquisition of a second AM-FM combination within a 60 mile area was permitted, and in *Millard V. Oakley*, 45 R.R. 2d 661 (1979), a construction permit was granted for a third AM station within 100 miles of two other stations, resulting in the common ownership of five radio stations in eastern Tennessee. Great Trails believes that it is

anomalous to permit such ownership situations because of a lack of primary service contour overlap but to prohibit, by strict application of the rule, other concentrations of ownership merely because of the existence of *de minimis* overlap. Great Trails also agrees that the rule has the adverse effect of preventing improvement in stations' facilities and that this is unfair to many FM licensees who must, according to the Commission's recent *Report and Order* in BC Docket No. 80–90, maximize facilities or ultimately lose their protected status as Class B or C stations.[14]

12. Other commenting parties (Viacom International, Inc., and Beasley Broadcasting Corporation) emphasize that, even if there existed well-founded concerns over oligopolistic control of the broadcast media, other sections of the Commission's multiple ownership rules, such as the "duopoly" and "one-to-a-market" provisions, are more appropriate for dealing with such concerns.[15] In any event, all of the parties supporting NAB's petition agree that the current diversity in the telecommunications marketplace has outstripped the need for the rule. Viacom and the National Radio Broadcasters Association ("NRBA") buttress NAB's showing in this regard by noting that 30,000 applications were recently filed for systems in the new multichannel multipoint distribution service, which will ultimately provide further competition and diversity of voices. Finally, several commenting parties note that, due to the dramatic changes in the marketplace, the Commission has recently refused to adopt multiple ownership rules for cable television, low power television and direct broadcast satellite services.

13. Citizens Communications Center ("Citizens") opposes NAB's petition, alleging that NAB has not set forth any factual or legal basis for repeal of the rule. Specifically, Citizens contends that NAB has not shown that any changes in current network practices and ownership patterns have occurred that would warrant the commencement of a rule making proceeding. Citizens further believes that NAB's objection to the rule on the basis of its "arbitrariness" is misplaced. In this regard, Citizens asserts that practically all regulations relying upon objective standards, such as the instant rule, are arbitrary to some extent, but that this does not undermine the basic rationality of the rule. Cases marginally violative of the rule can always be addressed through appropriate waiver procedures. Moreover, Citizens questions whether there actually is

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[14] *See Report and Order* in BC Docket No. 80–90, 53 R.R. 2d 1550 (1983).

[15] The "duopoly" rule prohibits the common ownership, operation, or control of two broadcast stations in the same service whose relevant contours overlap. The "one-to-a-market" rule prohibits ownership, operation, or control of more than one AM-FM combination, or one television station, or one daily newspaper in a market. However, overlap situations involving UHF television stations are considered on a case-by-case basis. These rules are found in Sections 73.35(a), 73.240(a)(1), and 73.636(a)(1) of the Commission's Rules.

sufficient diversity in the telecommunications marketplace to warrant repeal of the rule. It asserts that, as long as there are more prospective applicants than there are frequencies, the Commission should retain the rule in order to promote competition and the diversity of voices.

Discussion

14. After reviewing NAB's petition and the comments filed in connection with it, we believe that a rule making proceeding to reexamine our current regional ownership limitations is clearly warranted. First, the existing rule does not appear to have produced rational results. Second, the rule may be imposing significant costs on both the public and the broadcast industry. Finally, dramatic changes in the telecommunications marketplace, particularly the availability of many new broadcast and nonbroadcast outlets, may have obviated the need for any rule in this area, or at least may warrant substantial relaxation of the present restrictions.

15. *The 100-Mile Rule*. To begin with, our experience in administering the current rule leads us to the conclusion that it is arbitrary. In particular, the rule's rigid "minimum distance" and "contour overlap" criteria have not proved effective in accurately or consistently identifying circumstances in which undue concentration of control may occur and may actually have prevented consideration of factors plainly relevant to such determinations, such as the level of competing service. This has produced quite anomalous results in the cases. For example, in *WFGL, Incorporated*, 68 FCC 2d 892 (1982), an application to assign an AM-FM combination was dismissed even though the proposed assignee had shown that the community in question was separated from other commonly-owned stations by extensive mountainous terrain and numberous competing broadcast stations, thus offsetting any potential for concentration of control of the media. Similarly, in *Tri-State Broadcasting, Inc.*, 52 R.R. 2d 1013 (1982), the acquisition of an AM station was prevented without regard to the *de minimis* nature of the contour overlap involved (4% of the coverage area of the other two stations) and despite the fact that the overlap actually predated the adoption of the rule. Moreover, the inflexible requirements of the rule compelled this result notwithstanding a showing that the closest commonly owned station was 85 miles distant and was separated by the much larger market of Ft. Wayne, Indiana, that had numerous and more dominant broadcast outlets.[16]

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[16] It should be noted that both the *WFGL* and *Tri-State* cases involved requests for waiver of the "fixed" regional concentration rule. In such cases, the Commission had held that an applicant for waiver would have to show more than the presence of factors which, under the former case-by-case approach, would have justified an exception. *See also*, *Piedmont Service Corporation*, 68 FCC 2d 992 (1978) and *Robeson Broadcasting Corporation*, 52 R.R. 2d 1412 (1982).

16. Other cases, of similar potential concern but technically outside the scope of the rule, have been treated quite differently. For example, in *Millard V. Oakley*, 45 R.R. 2d 661 (1979), a construction permit was granted for a third AM station within 100 miles of two other stations, resulting in common ownership of five radio stations in eastern Tennessee. Despite the geographic proximity of the stations involved, the rule was not triggered because measurements revealed that there was no primary service contour overlap. In resolving an informal objection based on concentration concerns, the Commission determined that, regardless of the operation of the "fixed" rule, no concentration of control was likely because "the cities involved are quite small . . . [and] there is no indication that the cities' broadcast facilities compete with each other for advertising revenue."[17] Additionally, the Commission noted that there was no evidence of anticompetitive behavior by the applicant.

17. Similarly, in the recent case of *Acadian Television Corporation*, 51 R.R. 2d 743 (1982), an assignee was permitted to acquire VHF television station in Lafayette, Louisiana, even though it already controlled a clear channel AM facility and FM and VHF broadcast stations in New Orleans. Although there was primary service contour overlap of the television stations, the rule did not apply because the stations were located approximately 125 miles apart. Because a petition to deny had been filed raising concentration questions, the Commission substantively addressed the issue, concluding that the presence of numerous other broadcast outlets, as well as the lack of any evidence of unfair business practices, militated against the possibility of an undue concentration of control. It is particularly striking here that, in finding no danger of concentration, the Commission explicitly relied on factors such as the presence of numerous other broadcast stations, while this very consideration was deemed unpersuasive in cases within the ambit of the rule, such as *Tri-State Broadcasting, Inc., supra*.

18. In our view, the anomalous results illustrated by the above cases call into serious question the continued advisability of our current approach to regional concentration of control issues. Our doubts in this regard are reinforced by our concern that the stringency and strict application of the existing rule may be imposing unwarranted, and possibly counterproductive, costs on both the public and the broadcast industry. In this connection, the rule may have prohibited the acquisition of stations which could have resulted in enhanced program service in given markets. Similarly, in cases such as *Piedmont Service Corporation*, 68 FCC 2d 992 (1978), the rule has precluded the improvement of existing facilities that may have provided a first daytime or nighttime broadcast service in certain areas.

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[17] *Millard V. Oakley*, 45 R.R. 2d 661, 664 (1979).

19. Moreover, it has been suggested that the rule restricts various economies of scale inherent in the multiple ownership of stations that, were they available, might actually contribute to diversification of viewpoints.[18] For example, permitting increased multiple ownership on a regional basis could afford a broadcaster access to larger audiences and advertising bases that might justify incurring the costs of providing additional programming to the public. Regional networking, with the cost benefits such arrangements could provide in terms of program development and distribution, also might be facilitated. Additionally, certain organizational and operational efficiencies may accrue from greater multiple ownership. The resources saved by such efficiencies could then be turned to expanding programming or activating unused allocations that might be viewed as too great an economic risk absent the benefits of multiple ownership. We invite interested parties to address our analysis of the existing regional concentration of control provisions and request that they specifically review the benefits and detriments of the current rule.

20. *Marketplace Developments*. Beyond the specific difficulties surrounding the existing regional concentration rule, we believe that the significant growth in media outlets in recent years clearly constitues a substantial change in circumstances that strongly suggests a need to reevaluate our assumptions in setting regional ownership constraints, including whether such constraints, in any form, are still necessary.[19] In adopting regional ownership limitations, we were concerned with avoiding undue ownership concentration of the media within a given area. Specifically, the Commission sought through its ownership restrictions to enhance the diversity of

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[18] *See, e.g.,* A. Parkman, *An Economic Analysis of the FCC's Multiple Ownership Rules*, 31 Admin. L. Rev. 205, 217–221 (1979). *See also Notice of Proposed Rule Making* in Gen. Docket No. 83–1009, 48 Fed. Reg. 49438, published October 25, 1983, at para. 38.

[19] In recognition of these dynamic changes, we already have instituted rule making proceedings looking toward revision of the national multiple ownership rules ("seven station" rule) and repeal of the network/cable cross-ownership prohibition. *Notice of Proposed Rule Making* in Gen. Docket No. 83–1009, 48 Fed. Reg. 49438, published October 25, 1983; *Notice of Proposed Rule Making* in CT Docket No. 82–434, 47 Fed. Reg. 39212, published September 7, 1982. Similarly, these marketplace changes largely motivated our recent deregulation of the commercial radio service and our pending proposal to deregulate the commercial television service. *Report and Order* in BC Docket No. 79–219, 84 FCC 2d 968 (1981), *recon. granted in part* 87 FCC 2d 797 (1981), *aff'd. in part and remanded in part sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Notice of Proposed Rule Making* in MM Docket No. 83–670, 48 Fed. Reg. 37239, published August 17, 1983.

viewpoints available to the public and to preserve economic competition in the broadcast media.[20] However, as the number of competing voices in the marketplace rises, the potential influence of any given combination of commonly owned outlets is diluted and our concern with the impact of such combinations on diversity and levels of competition declines accordingly.

21. The increase in the number and variety of media voices in telecommunications markets is well documented and substantial. Specifically, we note that the number of authorized radio and television stations has increased by 18.9% and 36.7%, respectively, since the "fixed" regional concentration rule was adopted six years ago. Moreover, these figures are likely to increase due to several Commission actions in the allocation of radio and television frequencies. For example, in Docket No. 20642, we permitted the shared use of Class I-A clear channel frequencies, which may ultimately result in the addition of more than 100 new AM stations.[21] Similarly, our recent action in BC Docket No. 80–90 could create approximately 500 new FM stations.[22] We also have granted over 300 construction permits, with some 11,000 additional applications still pending, in the new low power television service.

22. It is also true, as NAB points out, that the broadcast industry faces additional competition from the expansion or authorization of new media delivery systems, which have the potential of promoting even greater diversity of ownership and viewpoints. As noted earlier, the growth in the cable industry has been quite significant, with cable subscribers totalling approximately 25 million as of January 1, 1983.[23] Moreover, Commission records reveal that, as of September 9, 1983, approximately 16,500 applications were filed for systems in the newly authorized multichannel multipoint distribution service.[24] Additionally, eight entities have been authorized to provide direct broadcast satellite ("DBS") service, with each operator capable of providing two to ten channels of programming to all television households in the United States. Although these companies might not commence DBS service until 1986, at least one entity is already providing "satellite-to-home" television programming to subscribers by use of the fixed satellite band.[25] Further competition can be expected from satellite master antenna systems, conventional multi-

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[20] *See First Report and Order* in Docket No. 20548, 63 FCC 2d 824, 827 (1977). *See also First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 307 (1970).

[21] *Report and Order* in Docket No. 20642, 78 FCC 2d 1345 (1980), *recon. denied*, 48 R.R. 2d 1077 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982).

[22] *Supra* note 14.

[23] *Supra* note 12.

[24] FCC Public Notice, Mimeo No. 327, October 24, 1983.

[25] *See GTE Satellite Corporation*, 90 FCC 2d 1009 (1982), *recon. denied*, FCC 83–271, released June 23, 1983. *See also Satellite Business System*, FCC 83–403, released November 2, 1983.

point distribution systems and subscription television stations in certain markets, and other distribution services. Accordingly, we request comments concerning the impact of this continuing growth of both broadcast and nonbroadcast outlets on the diversity of voices and levels of competition in modern telecommunications markets and whether changes in this regard warrant elimination or substantial relaxation of our regional concentration requirements.[26]

23. Given this significant increase in the number of media outlets, as well as the arbitrary results and clear costs associated with the regional ownership provisions, our initial judgment is that the rule should be repealed. However, to the extent that commenting parties recommend relaxation rather than elimination of the rule, they should explicitly address the question of how the rule should be changed and what effect the proposed changes are expected to have. We also solicit information concerning the effect of other Commission ownership constraints, such as the "duopoly" and "one-to-a-market" rules, on the continued need for regional concentration of control provisions. Similarly, we seek comments on whether and to what extent non-Commission restrictions on concentration of control, such as the antitrust laws, should affect our decision. In this connection, we specifically request comment on NAB's suggestion that the antitrust laws and the marketplace itself are better suited to redressing any concentration concerns that might arise if there are still situations where the general growth in media outlets has not yet produced adequately competitive or diverse markets.

24. Commenters are also invited to address the nature and extent of the costs imposed by regional ownership limitations, particularly those which may be adversely affecting our diversity and competition goals. In this connection, we specifically direct the attention of commenting parties to the possible economies of scale which may be lost by continued application of regional ownership constraints and the effect these "opportunity costs" might have on impeding the expansion of diversity and competition. Similarly, parties should address the impact of such constraints in preventing the expansion of existing facilities, thus frustrating the extension of new service.

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[26] Various methodologies have been suggested concerning the means we might use to gauge levels of diversity and competition for purposes of reevaluating our ownership rules. *See, e.g., Notice of Proposed Rule Making* in Gen. Docket No. 83–1009, 48 Fed. Reg. 49438, published October 25, 1983; and *Notice of Proposed Rule Making* in CT Docket No. 82–434, 47 Fed. Reg. 39212, published September 7, 1982. *See also* J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets*, FCC Office of Plans and Policy, December 23, 1982. Parties are invited to consider the suitability of these approaches, as well as others, in the context of our regional concentration proposals.

Administrative Matters

25. Accordingly, IT IS ORDERED, That the Petition for Rule Making (RM-4564) filed by the National Association of Broadcasters IS GRANTED.

26. This action is taken pursuant to the authority contained in Sections 4(i) and (j), 303 and 313 of the Communications Act of 1934, as amended.

27. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before February 21, 1984, and reply comments on or before March 7, 1984. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

28. In accordance with the provisions of Section 1.419 of the Rules, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting 1 copy. All timely comments will be considered, regardless of the number of copies submitted. In any event, all comments must contain reference to the appropriate docket number (MM Docket No. 84–19). All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters, 1919 "M" Street N.W., Washington, D.C. 20554. For general information on how to file comments, please contact the FCC Consumer Assistance and Small Business Division at (202) 632-7000.

29. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis ("IRFA") of the expected impact on small entities of the proposals advanced herein. The IRFA is set forth in Appendix "C". Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, as required by Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 50 U.S.C. § 601 *et seq.*, (1981)).

30. For purposes of this nonrestricted notice and comment rule

making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a Public Notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments and formal oral arguments) addressing the merits of a pending proceeding and containing matters not fully covered in any previously filed written comments for the proceeding. Any person who submits a written *ex parte* presentation must submit a copy of that presentation to the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation must prepare a written summary of it which must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.231 of the Commission's Rules.

31. For further information regarding this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-7792

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

NOTE: Appendices A and C may be seen in FCC Dockets Branch, Washington, D.C. 20554.

APPENDIX B

The "Three-Station Regional Concentration Rule"

Sections 73.35(b)(1) and (2) [AM], 73.240(a)(2) and (3) [FM], and 73.636(a)(2) and (3) [TV] of the Commission's Rules provide:

"No license for an AM [FM] [television] broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other AM [FM] [television] broadcast station if the grant of such license would result in a concentration of control of AM [FM] [television] broadcasting in a manner inconsistent with the public interest, convenience or necessity. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers or directors of . . . three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations."

"The reference points which shall be used for city-to-city measurements are those listed in the Index to the *National Atlas of the United States of America*, United States Department of Interior, Geological Survey, Washington, D.C., 1970. (Future editions will supersede). In the case of any community of license which is not referenced by the National Atlas, such as a newly established community, the point of reference shall be the main post office until such town is referenced. The National Atlas is available for reference at most public libraries and at the FCC in Washington."

"NOTE 11: For the purposes of the three station regional concentration provision of this section, (a) an application raising a regional concentration of control issue which involves overlap of or by one or more UHF television stations will be treated on a case-by-case basis, consistent with the precedents of UHF determinations made under the one-to-a-market proscriptions of this section, and (b) AM and FM broadcast stations licensed to communities which are within 15 miles (city reference point to reference point) and/or within the same urbanized area (as mapped by the U.S. Bureau of the Census), will be considered as a combination and counted as one station."

APPENDIX C

Initial Regulatory Flexibility Analysis

I. *Reason for Action.* Based on its experience in administering the regional concentration of control rule, the Commission believes that a rule making proceeding is warranted to determine the extent of problems associated with the present rule, as well as whether there is still a need for any type of regional ownership restraints. Specifically, the rule is arbitrary and does not appear to have produced rational results in the cases. Additionally, it may actually work against enhancing diversity of viewpoints and increasing levels of competition by imposing unnecessary costs on the broadcast industry. Moreover, the significant changes in the telecommunications marketplace, particularly the availability of many new broadcast and non-broadcast voices, raises the question of whether the marketplace itself is achieving the goals of the rule.

II. *Objectives.* The Commission seeks to review the benefits and detriments of the present regional concentration of control rule, with particular attention to the question of whether the instant rule has been effective in achieving its goals. Further, the Commission seeks to determine whether the increased levels of competition and diversity of viewpoints within telecommunications markets warrant repeal or substantial relaxation of our regional concentration requirements.

III. *Legal Basis.* The action taken by the *Notice* is authorized by Sections 4(i) and (j), 303 and 313 of the Communications Act of 1934, as amended.

IV. *Description, Potential Impact and Number of Small Entities Affected.* Adoption of the proposals set forth in this *Notice* would permit increased multiple ownership of commercial AM, FM and television stations on a regional basis. Under the present rule, the common ownership, operation, or control of a third AM, FM or television station is prohibited if such station is located within 100 miles of two other stations and there is primary service contour overlap between any of the stations. A substantial number of existing broadcast stations potentially subject to this rule are small entities. However, the impact of either repeal or relaxation of the rule on those stations owned by small entities is not known. In any event, the Commission believes that several benefits to all broadcasters, including small entities, may flow from this proposal. For example, repeal or relaxation of the rule may permit broadcasters to realize certain economies of scale which, in turn, may result in greater efficiency and increased programming.

V. *Recording, Record Keeping and Other Compliance Requirements.* The proposed repeal or relaxation of the rule would eliminate the need for broadcasters, including small entities, to file for waiver of the rule. It is estimated that approximately 71 long-form broadcast applications raise regional concentration issues each year.

VI. *Federal Rules which Overlap, Duplicate or Conflict with this Rule.* None.

VII. *Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with the Stated Objective.* None other than those advanced in the *Notice.*

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Notice of Proposed Rulemaking Regarding Repeal of the Regional Concentration of Control Rules

I dissent to the issuance of this NPRM because it portends considerable further erosion[1] of the FCC's longstanding and meritorious broadcast ownership diversification objectives without substantial countervailing public interest benefits.[2] Had the NPRM seriously analyzed alternatives to the current rules short of repeal, I could have agreed in principal with its issuance.[3] However, the Notice makes plain that the outcome of this proceeding is almost certainly the elimination of the regional concentration rules. That being the case, I cannot endorse it. Perhaps the commenting parties will persuade me that the FCC's prior commitment to maximizing diffusion of broadcast ownership will not be seriously compromised if these rules are repealed, but I remain to be convinced.

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[1] *See generally Notice of Proposed Rulemaking,* FCC 83–440, 95 FCC 2d 360, 48 Fed. Reg. 49438, 49453–55 (Oct. 25, 1983) (Dissenting Statement of Commissioner Henry M. Rivera).

[2] For example, the Notice's suggestion that without the rule broadcasters are likely to produce more programming is speculative at best. The argument that if the rule is repealed existing broadcasters may activate unused allocations is similarly unpersuasive as a justification for repealing the rule. There is no dearth of applicants for radio and television authorizations and, thus, no inducement is needed on this score.

[3] While a persuasive case for outright repeal has not been made, few rules cannot be improved by periodic reexamination, and these are probably no exception.

Comparative Hearing
Diversification of Control of Mass Media
Minority Ownership
Ownership and Management, Integration of
Review by Review Board
Television Station, Authorization

Review Board affirmed ID; granted comparative TV applicant with solid diversification and slight integration preferences. Loser had local noncommercial FM broadcast interests. Winner integrated its two general partners (local residents, one with broadcast experience); loser had 87% credit enhanced by 18% minority ownership, residence, experience. Threshold showing of special minority sensitivity required.
–San Joaquin TV Improvement Corp.
BC Docket No. 82–552

FCC 83R–91

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SAN JOAQUIN TELEVISION IMPROVEMENT CORPORATION Clovis, California	BC Docket No. 82–552 File No. BPCT-820510KI
NORTH STAR COMMUNICATIONS, LTD. Clovis, California	BC Docket No. 82–553 File No. BPCT-820510KJ

For Construction Permit

Appearances

Michael Couzens, on behalf of San Joaquin Television Improvement Corporation; and *George R. Grange II* and *James E. Meyers*, on behalf of North Star Communications, Ltd.

DECISION

(Adopted: November 8, 1983; Released: November 16, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of San Joaquin Television Improvement Corporation (San Joaquin)

and North Star Communications, Ltd. (North Star) for authority to construct a new commercial television station to operate on Channel 43 at Clovis, California.[1] By *Hearing Designation Order*, 47 Fed. Reg. 36288, published August 19, 1982, the applications were designated for consolidated hearing on the standard comparative issue. In an *Initial Decision* (*I.D.*), FCC 83D-35, released June 27, 1983, presiding Administrative Law Judge (ALJ) Walter C. Miller granted the North Star application after finding it to be the comparatively superior applicant because its significant diversification preference and clear quantitative integration advantage, buttressed by qualitative enhancement factors, outweighed San Joaquin's 18% minority integration enhancement and its minor preference for proposing auxiliary power.

2. The proceeding is now before the Review Board on exceptions filed by San Joaquin and a reply brief filed by North Star. The Board has reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held October 4, 1983, and our examination of the record. We adopt the findings of fact in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the North Star application will best serve the public interest, convenience, and necessity.

3. *Diversification of Control of the Mass Media.* North Star's principals have no interests in other broadcast stations or general organs of mass communications,[2] and their acquisition of this first station would thus add a new voice to broadcasting and - most importantly - to the geographic area here relevant. San Joaquin, however, was downgraded significantly under the Commission's diversification criterion because at least 18% of its stockholders, including its proposed program director, Alicia Maldonado (6%), and its proposed business manager, Hugo Morales (6%), are actively associated with Radio Bilingue, Inc., which is the licensee of KSJV-FM (noncommercial), Fresno, California, and the permittee of an FM station (also noncommercial) in Modesto, California. Morales is also the Chairman of the Board of the permittee of a noncommercial FM station in Denver, Colorado. *See I.D.*, Concls. paras. 4–6. A third San Joaquin principal, and its proposed general counsel, Ysidro R.

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[1] A third competing application, that of TV-43, Inc., was previously returned to the Mass Media Bureau for further processing and therefore is not before us for consideration. *See I.D.*, at n.1.

[2] We thus affirm the ALJ's disregard of North Star principal Jack Burk's production activities, *see I.D.*, para. 14; these are nondecisional. *See Morris, Pierce and Pierce*, 88 FCC 2d 713, 723–24 (Rev. Bd. 1981), *review denied*, FCC 83–31, released January 25, 1983. And, San Joaquin has not shown that these activities involve a significant role in advertising with "underlying potential for media concentration or serious conflict [of interest]." *Pittsfield Community Television Ass'n.*, FCC 83R-61, released August 31, 1983 (Rev. Bd.), at para. 3.

Macias (6%) is - as is Ms. Maldonado - a member of the Radio Bilinque board. *Id.*, para. 6.[3] The most significant link between San Joaquin and Radio Bilingue, though, is Hugo Morales: Morales organized Radio Bilingue, became its founding president, and currently serves as its Executive Director as well as station manager of KSJV-FM, Fresno. *I.D.*, para. 46.[4] He is also board chairman of Station KHUM-FM, Denver, Colorado (under construction). *I.D.*, Concls. para. 5. The signals of both KSJV-FM and the Radio Bilingue FM station in Modesto are within the reception area of the prospective Clovis television station here at contest. *I.D.*, Concls. para. 5; *see also* Tr. 440–441. In view of the extensive Radio Bilingue activities of several of San Joaquin's proposed principals, North Star was awarded a "significant preference" under the diversification element,[5] the Commission's foremost comparative criterion. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

4. San Joaquin excepts to the diversification preference awarded to North Star and, relying primarily on *Waters Broadcasting Corp.*, 88 FCC 2d 1204 (Rev. Bd. 1981), *reversed on other grounds*, 91 FCC 2d 1260 (1982), asserts that concurrent involvement with noncommercial broadcast stations is not recognized as a comparative diversification factor. [6] *Waters*, however, is inapposite because there was in that recent case no mutuality of principals between Waters Broadcasting Corporation and a noncommercial facility belonging to the University of Michigan. Indeed, the only nexus between the two was the fact that the husband of the sole owner of Waters Broadcasting

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[3] Another San Joaquin principal, and its proposed director of news and public affairs, Albert Reyes, was - apparently until May 1983 - KSJV-FM's executive producer. *I.D.*, para. 43. North Star excepts to the ALJ's failure to consider Reyes' KSJV position in his diversification analysis. North Star Br. at 2 n.4. Because we generally affirm the dispositive diversification preference awarded North Star (*see infra* para. 4), we need not specifically rule on this incidental matter nor on North Star's demand that San Joaquin receive a further diversification penalty for Alicia Maldonado's present managerial position at Fresno Cable. *See* North Star Br. at 3 n.6. Also, because these matters are raised only in North Star's reply pleading - it did not file limited exceptions in this proceeding - North Star has in effect waived any objections to the *I.D. See* 47 CFR § 1.277(a).

[4] While Morales indicated at hearing that he was willing to leave KSJV-FM, Tr. 430, he did not declare at any time prior thereto that he would sever his ties with Radio Bilingue or the Fresno radio station. His hearing testimony comes too late, however, and a post-designation upgrading in the area of diversification will not be permitted. *See Muncie Broadcasting Corp.*, 89 FCC 2d 123, 129–130, *recon. denied*, 89 FCC 2d 1331 (Rev. Bd. 1982), *review denied*, 54 RR 2d 42 (1983); *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2137–38 (Rev. Bd. 1978), *aff'd*, 86 FCC 2d 423, 427 (1981). As a matter o fact, Ms. Maldonado indicated her intention to remain on the Radio Bilingue board (Tr. 214) as did Mr. Macias (Tr. 692–93). Hence, the Radio Bilingue interests of the San Joaquin principals are cognizable for purposes of this proceeding.

[5] *I.D.*, Concls. para. 17.

[6] *See* San Joaquin Br. at 2–7.

was coincidentally a present member of the University of Michigan Board of Regents. 88 FCC 2d at 1206. The Regents, while having a plenary oversight role over the entire university, were not shown to have any direct operational role with respect to the university's student station, *id.*; and the principal's husband in *Waters* had no proprietary interest or position whatever in the broadcast application filed by his wife. *See id.*, at 1206–07. The contrast here is obvious. For example, Hugo Morales is not merely a principal of the Clovis television applicant, but he is concurrently the station manager of one nearby broadcast station (KSJV-FM, Fresno), and he is actively involved with another Radio Bilingue radio station in Modesto as well as a more distant third station (Denver). Finally, two other San Joaquin principals (representing another 12% of its ownership) are deeply enmeshed in all of Radio Bilingue's multiple broadcast activities. San Joaquin's flat contention that noncommercial stations are not considered for comparative purposes is erroneous. Not only does the Commission effectively equate directorship positions at nonprofit broadcast entities with participating broadcast ownership interests in comparative cases, *see, e.g.*, *Roanoke Christian Broadcasting, Inc.*, 52 RR 2d 1725, 1727 (Rev. Bd. 1983), *review denied*, FCC 83–441, released September 27, 1983, but case precedent long ago established that active involvement in another broadcast station—even if not a commercial station—is to be considered under the general diversity criterion. *Milam & Lansman*, 6 FCC 2d 198 (Rev. Bd. 1966). In that case, one applicant was awarded a slight diversification preference because a principal of the competing applicant was also the general manager of a noncommercial station, and a distant station at that.[7] By contrast, Hugo Morales is the prime mover (and currently, Executive Director) of a growing entity that operates two broadcast facilities in the Clovis region and is, as noted, the station manager of one of those nearby California broadcast outlets. We do not believe that the significant broadcast activities of the subject San Joaquin principals can be simply ignored, for they unarguably impact on the question of a potential diversity of broadcast voices in the Clovis vicinity.[8] Because of the proximity of two Radio Bilingue stations, the vital role of Hugo Morales at both Radio Bilingue and KSJV-FM,[9] and the positions of the other principals at Radio Bilingue, San Joaquin must be considered comparatively inferior to North Star under the diversity criterion. And, even if we were to reduce somewhat the "significant preference" awarded to North Star by the ALJ, *see* I.D., Concls. para. 17, and labeled it, perhaps, "moderate," North Star's clear superiority under the Commission's most critical comparative element would be dispositive in this case, especially when coupled with its other comparative advantages discussed *infra*.

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[7] The frequency at issue in *Milam & Lansman* was in St. Louis, Missouri, but one of the M. & L. principals had "a 1;7 trusteeship interest in KRAB [a Seattle, Washington noncommercial station], which is located 1,700 miles from St. Louis. . . ." 6 FCC 2d at 201.

[8] While the Commission's emphasis on a diversity of voices is especially sensitive to minority viewpoints, *see, e.g.*, *Waters Broadcasting Co.*, *supra*, the Commission's more basic diversity objectives quite naturally extend to ensuring a multiplicity of minority viewpoints as well.

[9] At hearing, Morales testified that, as the salaried station manager of KSJV, he runs the station subject to general oversight of the Radio Bilingue directors. Tr. 431. He has day-to-day authority over programming and personnel. *Id.* When

5. *Integration of Ownership and Management*. North Star, which was credited with 100% full-time quantitative integration for the proposed station managerial roles of its two general partners, Jack Burk and Wesley Burroughs, was awarded a clear preference over San Joaquin, which received 87% full-time credit. *I.D.*, paras. 10, 24, Concls. para 7. San Joaquin excepts both to the award of 100% full-time credit to North Star and to the ALJ's rejection of its claimed 6% part-time credit for the proposed participation of Ysidro R. Macias as general counsel, as well as to the magnitude of the preference awarded to North Star. We affirm the award of a slight preference to North Star.

6. First, San Joaquin claims that North Star's integration credit should be diminished because its limited partners, Stanley and Darlene Spano (45% joint interest), who will not participate in station management, actually control the applicant—or, at a minimum, enjoy rights indistinguishable from those of voting shareholders. It labels the limited partnership agreement a "sham." San Joaquin Br. at 13–24.[10] The record evidence, however, establishes clearly that the limited partnership here in question, which was organized in accordance with the Uniform Limited Partnership Act, vests in the general partners only "full and exclusive authority to manage and control the business affairs and operations of the Partnership" and sole and exclusive responsibility "for the day-to-day and overall operations of the TV station." *See* TV-43 Exh. 7, para. 5.1. The limited partners are enjoined from participating in management and may vote solely on the election of new successor

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asked if he would be involved in the programming of San Joaquin's television station, he stated:

> Well, that's where I'm involved and I think that there will be some influence on the programming, I mean, that's why, I mean, I'm involved in this because there is—I believe there needs to be more creative television, there's a lot of people not being served currently in the San Joaquin Valley, the community is incredibly diverse and none of the other stations—

Id., at 435.

[10] We reject as totally unsupported San Joaquin's speculation that an extant business relationship—involving real estate development—between Messrs. Burk and Spano creates a "conflict of interest" that "cloud[s]" the limited partnership agreement. San Joaquin Br. at 22–24. Any such mutual business interest is unrelated to this proceeding and San Joaquin's claim raises no legal or factual matter of interest to the Commission.

general partners upon the retirement or legal disability of the last surviving general partner and on capital contributions beyond those explicitly provided for in the partnership agreement. *Id.*, para. 5.4. The fact that capital contributions are to be made by the limited partners only and that the general partners will provide management and service, but no capital, does not undermine the validity of the agreement. Insofar as we can discern, these are archetypical limited partnership agreement provisions. *See generally Minority Ownership In Broadcasting*, 52 RR 2d 1301, 1305–07 (1982) (Commission recognizes limited partnership agreements); *see also Anax Broadcasting, Inc.*, 87 FCC 2d 483, 487–88 (1981). Because North Star's general partners will have all of the full-time managerial duties at the proposed station (*I.D.*, paras. 10–11, 17, 22, Concls. para. 7), a fact which San Joaquin does not contest, and because we have concluded that they possess 100% legal authority and voting power and that there is no evidence to show that the North Star limited partnership arrangement is otherwise faulty, it is entitled to 100% full-time integration credit. *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 510–11 (Rev. Bd. 1982) and cases cited therein.[11] *See also Joseph Bahr*, 92 FCC 2d 114, 120 (Rev. Bd. 1982) and cases cited therein.[12]

7. Second, San Joaquin seeks part-time credit for integrating Mr. Macias as general counsel. However, we will deny this exception because we agree with the ALJ (*I.D.*, paras. 48–50) that his proposed position as general counsel is not a significant broadcast station

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[11] As in *Merrimack Valley*, we find *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978), relied on by San Joaquin, to be inapposite. There, unlike the situation here, a general partnership was involved in which the integrated partners were awarded no integration credit because they not only made no capital contributions but, most importantly, their participation was limited to making employee-like suggestions rather than having actual managerial authority. Similarly, *Henderson Broadcasting Co.*, 63 FCC 2d 419, 420–26 (Rev. Bd. 1977) (non-voting stockholder dominates voting stockholder, has control over finances, and can fire voting stockholder) is also inapposite.

[12] We also deny San Joaquin's exception that it was denied discovery on this matter. San Joaquin Br. at 19–20. In his *Order Prior To Prehearing Conference*, FCC 82M-2486, released August 16, 1982, the ALJ stated:

> Since discovery is discretionary and since the only designated issue is the standard comparative issue, it would conduce to the orderly dispatch of the Commission's business to forego any discovery *at this juncture*. If the issues are enlarged later on, provisions will be made for any needed discovery in the enlargement order.

Id., para. 5 (emphasis added). To this day, San Joaquin has failed to present any facts that would have warranted discovery. *See generally Discovery Procedures*, 11 FCC 2d 185 (1968). North Star's general partners Burk and Burroughs testified at hearing and were fully cross-examined on the limited partnership structure, *see* Tr. 455–684, and San Joaquin has not even alleged that the limited partners would have testified at variance with the record North Star testimony.

policy or management role, but only a consultative one entitled to no weight. *Policy Statement on Comparative Broadcast Hearings, supra,* 1 FCC 2d at 395. His mere proposal to "work up to 20 hours a week" (*I.D.*, para. 50; Tr. 688–92) is insufficient to merit part-time quantitative integration credit, *Midwest Broadcasting Company,* 70 FCC 2d 1489, 1495 and n. 11 (Rev. Bd. 1979).

8. Finally, San Joaquin claims that there is "no meaningful public interest difference in the quanta of numerical integration [100% v. 87%]," San Joaquin Br. at 29, and that the resolution of the integration criterion should be decided by qualitative factors. *Id.*, at 26–29. Without necessarily disagreeing with that assertion, we nonetheless believe that when all of the pertinent quantitative and qualitative factors are considered, North Star still deserves a slight preference for its integration proposal. In addition to the fact that its two controlling general partners (100%) are both entitled to the comparative enhancement due local residents, *I.D.*, paras. 12, 18, one of those general partners (50%) has some cognizable broadcast experience. These attributes are favorably considered. *Policy Statement, supra,* 1 FCC 2d at 395–96. In comparison, only 18% of those San Joaquin principals entitled to management integration credit are enhanced by local residence, or broadcast experience, or minority status. *I.D.*, Concls. paras. 10–15. *Cf. Merrimack Valley Broadcasting, Inc., supra,* 92 FCC 2d at 516–17 (qualitative enhancements are weighted in proportion to quantity of integration credit). Thus, although San Joaquin's quantitative integration is not greatly inferior to North Star's and its 18% minority principals do add enhancing merit to its scorecard, North Star would yet seem to have a slight overall advantage under this criterion, quantity and quality of integration considered *in toto.* The discussion below relating to minority ownership will further clarify, we hope, our comparative consideration of the integration elements analyzed in this section.

9. *Minority Ownership.* In view of the above discussion (paras. 7–8, *supra*), San Joaquin is here considered to be 18% owned by integrated minority principals (*I.D.*, Concls. para. 15),[13] and comparative merit based thereon was awarded by the ALJ. *I.D.*, Concls.

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[13] North Star asserts that San Joaquin made no specific showing of minority ownership in its direct case and that, therefore, there is no record upon which any consideration of minority ownership can be based. On the other hand, however, North Star does not submit that the San Joaquin principals in question are not minorities within the Commission's contemplation. Hence, any error here appears technical and harmless. Inasmuch as North Star does not seriously question the minority status of San Joaquin's 18% principals (indeed, it affirmatively tried to neutralize it, *see* North Star Exh. 6 and discussion of TV 9, *infra*), neither shall we.

paras. 10–12. However, invoking a hertofore dormant aspect of *TV 9, Inc.* v. *FCC*,[14] North Star attempted at hearing to submit evidence designed to show that any meritorious consideration of San Joaquin's minority ownership should be offset, at least, by countervailing factors.[15] In so doing, North Star relied on the language of the court's supplemental opinion in *TV 9* wherein it reasoned that the comparative minority ownership merit first exhorted in the prior panel decision (*see* 495 F.2d at 937–38) was not an impermissible abridgement of the rights of non-minority applicants because it was not necessarily exclusionary. Thus, the court said:

> A ((minority)) preference did not necessarily follow ((its panel decision)) since competing applicants were not foreclosed from seeking similar or greater merit.[3]
>
> * * *
>
> [3] With respect to a preference, our opinion does not hold that a competing applicant, without any minority group representation in ownership or management, could not have proved that it could better have served the public interest in promoting diversification of opinion and viewpoint in the respects with which the court is concerned in this case, and by so doing to have gained a preference over ((the applicant with minority ownership)).

495 F.2d at 941 & n.3. As suggested, and insofar as we are aware, no applicant prior to North Star has attempted the type of showing apparently contemplated above by the *TV 9* court and we are, so far as is relevant, confronted with a matter of first impression.[16]

10. In the instant hearing, it appears that the ALJ rejected North Star's evidence because North Star either failed or refused to proffer a threshold showing of the nature ordinarily necessary for comparative consideration of allegedly unusual programming.[17] North Star asserts error and contends that its novel showing was not subject to the threshold requirements set forth in *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 464–66 (1979) (threshold showing required for consideration of "specialized format") or *Chapman Radio and Television Co.*, 7 FCC 2d 213, 214–15

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[14] 495 F. 2d 929 (D.C. Cir. 1973), *en banc rehearing denied*, 495 F. 2d 941 (1974) (*Supplemental Opinion*).

[15] *See* North Star Br. at 6–9. *See also* North Star Exh. 6 in which it proposed to demonstrate special sensitivity to the minority audience.

[16] In *Mid-Florida Television Corp.*, 69 FCC 2d 607 (Rev. Bd. 1978), the very proceeding remanded by the *TV 9* court, the Board noted that a non-minority applicant had claimed its own sensitivity to blacks. *Id.*, at 652. But it does not appear that a specific showing in support of this claim was proffered and, in any event, the Board's *Mid-Florida* decision was vacated by the Commission, *see* 87 FCC 2d 203 (1981).

[17] North Star's showing included - in its words - "17 proposed programs which would be responsive to needs of the Hispanic community." North Star Br. at 7 n.11. It also described a proposed minority advisory committee. *Id.*

(1967) (threshold showing required for consideration of alleged "unusually good" programming).[18]

11. As noted previously, there is no precedent directly apposite to these circumstances, and it must be acknowledged that there has been no clear guidance given on the procedural treatment of evidence proffered under the specific *TV 9* principle invoked by North Star. Thus, any uncertainty or disagreement in this uncharted landscape is understandable. Nonetheless, and with the considerable advantage of hindsight, we cannot find fault with the ALJ's demand for a threshold showing, especially since North Star's evidence here partook heavily of proposed programming.[19] As explained more fully in *Chapman*, *supra*, no proposed programming will be considered decisional, and consequently no evidence thereon regarded as probative or useful, in the absence of a *prima facie* showing which reflects "significant differences" linked directly to demonstrable community needs and interests. *See* 7 FCC 2d at 214–15. By imposing a threshold burden on North Star here, the ALJ cannot be said to have peremptorily denied it the right to make a minority sensitivity showing of the type presumably anticipated by the *TV 9* court.

12. At the same time, we recognize that our views on the particular ruling are necessarily *post hoc*; and we believe that further tentative guidance would be helpful to avoid confusion in future cases. Having agreed that a threshold showing is a reasonable prerequisite in situations such as this, we must also observe that inasmuch as the Commission has not spoken directly on this issue,[20] no definitive prescription of the metes and bounds of such a showing is possible. Nevertheless, our own view is that we ought not at this point preclude an applicant from any specific showing it considers relevant and material to the potential designation of an appropriate issue under the subject *TV 9* principle. It might be that one applicant

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[18] North Star Br. at 8–9.

[19] *See supra* note 17.

[20] Had this issue been perceived as decisional in this case, we would have seriously considered a limited certification to the Commission for instructions. Accordingly, we recognize that any views expressed herein are subject to modification by the Commission and, thus, are necessarily tentative. But, in view of the arguments advanced by North Star in this case and our role in interpreting Commission policy and applying applicable case law, we believe that some guidance, however provisory, is necessary to assist both licensing litigants and others to proceed in a consistent manner pending final word from the Commission. *See generally Horne Industries, Inc.*, FCC 83–208, 53 RR 2d 1647 (1983) (remanding proceeding certified by Board for its initial consideration). It should also be noted that this is not the first time that the Board has been compelled by its intermediate reviewing role to address in the first instance the holding of *TV 9*, and to do so in the absence of prior Commission direction. Thus, in *Mid-Florida Television Corp.*, *supra* note 16, the Board awarded the first independent merit for minority ownership although the Commission had issued no interpretative instructions in any agency statement or decision following *TV 9*.

may wish to rely on proposed programming; another may wish to show minority employees in key managerial positions (*e.g.*, general manager, station manager, program director). Other matters such as an applicant's prior active involvement in minority-oriented groups and causes or proposed relationships with local minority-oriented organizations may be probative. Or, there may be a combination of factors. These examples are, of course, merely several that come immediately to mind and - for the reasons stated above - they should not be considered as preclusive or definitive. Until such time as more experience is acquired or further Commission direction is available, reasonable discretion should be afforded to the ALJs and the applicant parties. And the general rule - particularly at this tentative juncture - ought to lean cautiously in favor of exposure rather than foreclosure. Obviously, frivolous or plainly irrelevant matter should not be accepted. But, evidence that appears *prima facie* material to the issue should be fairly weighed in determining whether an appropriate issue ought to be designated. Finally, having reviewed no showing or actual issue of the nature under discussion, the Board cannot prescribe in advance the precise comparative weight to be accorded to any particular factor or group of factors claimed under *TV 9* to offset minority ownership; each factual situation will require its own analysis, just as do the multiple factors in every comparative case. The pertinent factors should be carefully balanced according to their relative strengths and weaknesses; and with time and case-by-case experience, a more focused outline of the law will undoubtedly emerge, just as it has with all other comparative ingredients.[21] Above all, however, the court's holding as expressed in *TV 9* will serve as the touchstone and its intentions on this subject should (and shall) be effectuated in the fullest good faith.

13. Although awarded due comparative merit since 18% of its ownership is composed of minority principals who will be integrated into station management,[22] San Joaquin argues that more credit should have been awarded because the Commission's interpretation of *TV 9*, *supra*, is wrong in considering minority ownership under the integration criterion rather than under the general realm of diversity. *See WPIX, Inc.*, 68 FCC 2d 381, 411–12 (1978). However, as the Commission indicated in *WPIX*, it believes that any assumption that minority ownership will bring actual viewpoint diversity is best assured when those minority owners have active responsibility for

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[21] This case-by-case evolution of comparative standards is not novel. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 399 (1965). The comparative process, by its very nature, is kaleidoscopic; each relevant factor must be duly considered and a final balance struck. *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949).

[22] San Joaquin argues for additional credit, in part, because another 8% of its stock will be owned by minority principals even though those principals will not be integrated into station management. *See* San Joaquin Br. at 7–11.

station operations. *Id.* The Board, of course, has no license to modify or ignore Commission precedent and, therefore, San Joaquin's arguments challenging *WPIX* are without power in this forum. As to the weight to be accorded its 18% minority ownership, we find it relatively slight and generally inadequate to assure that any minority ownership views will translate into the practical management influence requisite to a strong presumption of potential viewpoint diversity. *Horne Industries, Inc.*, 54 RR 2d 249, 258–59 (Rev. Bd. 1983) (15% minority ownership entitled to only slight comparative merit). San Joaquin's minority ownership level is, in any event, insufficient to overcome its other comparative minuses and the *I.D.*'s ultimate conclusion in this regard is correct and will not be disturbed.

14. *Summary*. All decisionally significant exceptions have been addressed. North Star, which has a solid diversification preference and a slight quantitative integration preference (enhanced by local residence and some broadcast experience), is superior to San Joaquin, which has a slight auxiliary power preference[23] and a slight enhancement for minority integration and local residence.

15. ACCORDINGLY, IT IS ORDERED, That the application of North Star Communications, Ltd. for a new commercial television station at Clovis, California (File No. BPCT-820510KJ) IS GRANTED; and the application of San Joaquin Television Improvement Corporation (File No. BPCT-820510KI) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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[23] San Joaquin's request for a "moderate" rather than "minor" preference for auxiliary power is rejected. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966); *New Continental Broadcasting Company*, 88 FCC 2d 830, 851 (Rev. Bd. 1981), *remanded on other grounds*, 53 RR 1004 (1983).

FCC 83D–35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SAN JOAQUIN TELEVISION IMPROVEMENT CORPORATION Clovis, California	BC Docket No. 82–552 File No. BPCT-820510KI
NORTH STAR COMMUNICATIONS, LTD. Clovis, California	BC Docket No. 82–553 File No. BPCT-820510KJ
For Construction Permit	

Appearances

Michael Couzens on behalf of San Joaquin Television Improvement Corporation; *James Myers*, *George R. Grange* and *James A. Gammon* on behalf of North Star Communications, Ltd.; and *Richard A. Helmick* on behalf of TV-43, Inc.[1]

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

(Issued: June 20, 1983; Released: June 27, 1983)

Preliminary Statement

1. This is the Initial Decision in the Clovis, California channel 43 UHF proceeding. Two competing applicants remain: San Joaquin Television Improvement Corporation (San Joaquin),[2] and North Star Communications, Ltd. (North Star).

2. The only issue that needs to be decided is the standard comparative issue. The hearings have been held, the record closed, and each applicant has submitted both its Proposed Findings of Fact and its Reply Findings.

Findings of Fact

Description of the Applicants

3. *North Star*. North Star, a limited partnership, consists of two

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[1] TV-43, Inc.'s application was returned to the TV Processing Line. See FCC 83M-1009 released March 29, 1983, and FCC 83M-1271 released April 18, 1983.

[2] Formerly Solid State Components Corp. See FCC 83M-389 released January 31, 1983.

general partners and two limited partners. Jack A. Burk and Wesley Burroughs are the two equal general partners. The two limited partners are a husband and wife, Stanley and Darlene Spano. The Spanos jointly hold 45% of the partnership's equity.

4. *San Joaquin*. San Joaquin, a California Corporation, is made up of seven stockholders. 69% of San Joaquin's stock is owned by another California Corporation, Solid State Components. But, in turn, 100% of Solid State is owned by one person, Arnold Applebaum. The other San Joaquin stockholders are: Ysidro R. Macias (6%), Alicia Maldonado (6%), Hugo Morales (6%), Al Reyes (6%), Fernando Aguirre (2%), and Television Center, Inc. (5%).

Diversification of Mass Media

5. *North Star*. North Star has no ownership interest in any authorized broadcast facility or any other media of mass communications; and none of North Star's general or limited partners have any such interests.

6. *San Joaquin*. San Joaquin has no ownership interest in any authorized broadcast facility or any other media of mass communications. However, some of its shareholders have broadcast interests.

7. Hugo Morales, a 6% stockholder, and San Joaquin's proposed Business Manager, is the Executive Director of Radio Bilingue, Inc. (RBI). RBI is the licensee of noncommercial FM broadcast station KSJV, in nearby Fresno, California and the permittee of a new noncommercial FM station at Modesto, California.[3] Morales is the Station Manager of KSJV. He is also the Chairman of the Board of the permittee of noncommercial educational FM broadcast station KHUM, Denver, Colorado.[4]

8. Alicia Maldonado, a 6% stockholder, and San Joaquin's proposed Program Director is a member of Radio Bilingue, Inc.'s board of directors.[5] Ysidro R. Macias, a 6% stockholder, and San Joaquin's proposed General Counsel is also a member of Radio Bilingue's board of directors.[6]

9. Neither Morales, Maldonado, nor Macias indicated by the June 30, 1982 "B" cut-off date or at any other time prior to hearing that they would resign all positions they presently hold.

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[3] The Modesto FM station that is under construction and KSJV are both Class B facilities. The Modesto FM station's signal will get into Clovis and KSJV can be heard in Modesto. The proposed Clovis Channel 43 signal will also reach Modesto (Tr. 440–441).

[4] San Joaquin has never reported Mr. Morales' interest in the KHUM, Denver operation.

[5] Radio Bilingue's board of directors meets monthly. It controls the policy, finances, and management of KSJV.

[6] Certain of San Joaquin's stockholders have filed for other TV facilities. But since none of those applications have yet been granted they are presently irrelevant.

Integration of Ownership With Management

10. *North Star*. North Star claims 100% integration credit. It intends to integrate its two general partners, Jack Burk and Wesley Burroughs, into the station's day-to-day operations. The general partners exercise complete control over all managerial and station policy, and programming decisions. The limited partners are strictly passive investors.

11. North Star will fully integrate general partner *Jack Burk* into its day-to-day operations as General Manager, Operations. As the full-time Operations General Manager, Burk will be in charge of all day-to-day activities at the station, all production and newscasting.

12. Burk was born in Springfield, Tennessee in 1935. He has lived in the Fresno, California area since 1977 and at 9391 East Ellery, Clovis, California, since December 1980. He moved from the midwest to Costa Mesa, California in 1953.

13. From 1961 until 1966 Burk worked as a quality control officer for the Rocketdyne Division of North American Aviation. Then at the end of 1966 he became an Investment, Insurance and Tax Shelter Specialist with the Equity Securities Corporation of Century City, California. He remained with Equity Securities until 1973 when he became Marketing Officer for Unimarc, Ltd., a financial service company headquartered in San Raphael, California. In January 1977 Burk became the Director of Business Affairs for the Peoples Foundation, a nonprofit corporation located in Fresno, California. He is presently with the Peoples Foundation as both the Director of Business Affairs and Special Projects Director.

14. At both Unimarc and Peoples (see para. 13 *supra.*) Burk has acquired broadcast related experience. In fact, at Peoples, he founded and still heads a separate profit-making corporation, P.F. Communications, Inc. (PFCI). PFCI operates all the Foundation's television and sound services. As its head, Burk has produced, directed, and distributed the Peoples Church Telecast, entitled "This Hour . . . With Pastor Johnson."

15. Burk is trained in videotape production and has worked with videotape recorders, computerized editors, broadcast quality cameras, studio configurations, and associated sets and lights. He has hired broadcast personnel, and has produced commercial spots; he is experienced with production values, programming spot generation and time purchases.

16. Most of Burk's civic activities are not directly concerned with Clovis - the proposed city of license. While he started participating in certain civic groups in Fresno, California (within the proposed service area), he began that participation *after* this case was designated for hearing.

17. North Star will also fully integrate its other general partner,

Wesley Burroughs, into the station's day-to-day operation as General Manager, Marketing. In that capacity he will supervise the program director, the sales department, and special projects such as developing syndicated program fare.

18. Burroughs was born in Hollywood, California in 1930. He has lived in Fresno, California since 1973 and currently resides at 1661 West Sierra. After high school, Burroughs studied for the ministry at Southwestern Assemblies of God College in Waxahachie, Texas. He was licensed for the ministry in 1951 and ordained in 1966.

19. He has had a varied background in religion and in business. As an ordained minister he has pastored two churches; he founded and pastored two others. He has been a licensed insurance agent and worked as a district and branch manager for Equity Funding Corporation. Later he became the associate director of the stewardship department of the World Literature Crusade.

20. In 1973, Burroughs joined the People's Foundation as Director of Consulting Services - the position he now holds. In that capacity he advises on fundraising, management consulting, planned giving and deferred giving programs. He also conducts clinics to encourage people to make a will and have a definite financial plan.

21. Burroughs is not civically active in the Clovis area. However, after this case was designated for hearing he did get somebody to recommend him for membership in the downtown Fresno Rotary Club. He has no previous broadcast experience.

22. San Joaquin has attacked North Star's integration claim on two fronts. First it disputes the quantitative claim of 100%. It argues that since the limited partners, the Spanos, hold a 45% equity interest in the partnership, North Star should only be credited with 55% integration for General Partners Burk and Burroughs. This argument must be rejected. The record demonstrates that the General Partners exercise complete control over all managerial and station policy and program decisions. So the Limited Partners' integration, or lack thereof, is inconsequential. See e.g. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 49 RR 2d 1589 (1981).

23. Secondly, San Joaquin tries to attack the quality of Jack Burk's integration. It accuses Burk of engaging in a pervasive conflict of interest (see San Joaquin PFs' 32–35 and PC 26). But that attempt must also be discarded. There is insufficient evidence to support such a serious charge.[7]

24. *San Joaquin*. San Joaquin claims that it will integrate five of its seven stockholders into its day-to-day operation. It says that four of the five (87%) will be integrated full-time and the other (6%) part-

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[7] Jack Burk was cross-examined about the alleged conflict. He denies that he's so involved. No other testimony on the subject was adduced. Neither Stanley Spano nor any official of the Peoples' Foundation were called to the stand.

time. The following chart sets out the quantitative aspects of the claim (S.J. Ex. 4):

Owner	*Percentage of Stock Ownership*	*Position at Station*	*Time Commitment*
Arnold Applebaum *	69%	General Manager	Full Time
Ysidro R. Macias	6%	General Counsel	Part Time
Alicia Maldonado	6%	Program Director	Full Time
Hugo Morales	6%	Business Manager	Full Time
Al Reyes	6%	News and Public Affairs	Full Time
Fernando Aguirre	2%		
Television Center, Inc.	5%		

* Applebaum owns 69% of San Joaquin via his 100% ownership of Solid State Component Corp.

25. San Joaquin intends to fully integrate 69% stockholder *Arnold Applebaum* into its day-to-day operation as General Manager. In that capacity Applebaum would select competent personnel, and approve all general expenditures, budgets, and allocations. He would either make or delegate programming decisions.

26. Applebaum was born in Lynn, Massachusetts in 1941. He, and his family, presently reside at 2053 Fullerton Road, LaHabra Heights, California. If San Joaquin is granted, Applebaum will either move to Clovis or to a place accessible to Clovis. He holds a Bachelor of Arts in Social Science which he received from Cerritos College.

27. Applebaum owns a manufacturing company, Solid State Devices, Inc. (SSDI). He founded the company in 1967, and is its President, and Chief Executive Officer. SSDI supplies power semiconductors to the military and aero-space markets. It has an International Branch that sells to accounts such as Hughes Aircraft, ITT, McDonnell-Douglas, Westinghouse, General Electric and U.S. Department of Defense. SSDI has 100 employees with another 25 in subsidiaries and affiliates. Applebaum devotes 30 to 40 hours per week to managing this business. SSDI is located in LaMirada, California. If San Joaquin is granted, Applebaum will reduce the time he spends managing SSDI to "one day a week—8 hours."

28. Applebaum is also co-founder, chief executive officer, secretary, and 51% owner of a semi-conductor company called Semi-Conductor Development Corporation (SCDC). SCDC is located in Visalia, about 200 miles from LaHabra. It manufactures high-voltage rectifiers and diodes. SCDC has from 12 to 20 employees, but Applebaum foresees a significant expansion up to 100 employees. He currently spends about 5 hours a week managing SCDC.

29. Applebaum also owns and manages more than 100 parcels of real estate in California, Colorado, Texas and Oregon.

30. Finally, Applebaum is the 100% owner and President of Solid State Components Corporation (SSCC). SSCC is a wholesale distributor of electronic components. It is SSCC's communications division that holds the 69% controlling interest in the Channel 43 application. SSCC has four full-time employees in its LaHabra offices, and Applebaum devotes about five hours a week to managing this business.

31. Applebaum has no broadcast experience and is not engaged in civic activities for the Fresno/Clovis area or elsewhere.

32. North Star contends that Applebaum cannot meet his full-time integration pledge. It argues that with all his business interests, with all the travel back and forth between Fresno and his plants in Visalia, and LaMirada, and with his additional management responsibilities for his more than 100 parcels of real estate in California, Colorado, Texas, and Oregon, Applebaum's full-time claim is untenable, and that, at most, he should be credited with a part-time 30-hour commitment.

33. Although North Star's argument has a certain appeal, it can't be credited. Applebaum has made a firm unequivocal commitment that he will devote full-time to managing and operating the TV station as its General Manager. And he promises that "whether the time demands of the job are forty hours per week or forty-five or sixty. . ." he will devote what it takes. There is no reason to believe he won't do just that.[8]

34. San Joaquin proposes to fully integrate 6% stockholder *Alicia Maldonado* into its day-to-day operation as Program Director. Mrs. Maldonado was born on April 16, 1952. She is a U.S. citizen, an Hispanic, and a life-long resident of Fresno, California. In January 1975, she graduated from Fresno State University with a B.A. in journalism.

35. Mrs. Maldonado has nine years of TV broadcast experience. She started working at Channel 30 in Fresno as a "copy girl." There she worked with slides, and prepared copy, logs, and program schedules. After graduating in 1975, she became a full-time staff member at Channel 30 as a news producer and documentarian. As documentarian she produced both half-hour documentaries, and five-minute educational messages in Spanish.

36. In 1980 Mrs. Maldonado became public affairs coordinator at Radio Bilingue's KSJV (FM) in Fresno. There she trained volunteer workers, oversaw production, and administered program standards and practices. Her department produced half-hour documentaries, some of which were in both English and Spanish. She also did women's programs and children's programs.

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[8] At paragraph 4.7 of its proposed findings, North Star takes a side-swipe at Applebaum's capacity for truthfulness. Having observed his demeanor when he testified the Presiding Officer concludes that Applebaum was more orally awkward than he was untruthful.

37. In 1981, Mrs. Maldonado became the program director for the local community access channel at Fresno Cable - the job she presently holds. There she oversees local production. She is not active in civic affairs.

38. North Star attacks Alicia Maldonado's integration claim. It claims that her alleged participation is nothing more than Arnold Applebaum's "window dressing." It notes that Mrs. Maldonado was introduced into San Joaquin's application on the B cut-off date as a result of a single meeting held in Fresno just before that date.[9]

39. Consequently, says North Star, the record shows that Mrs. Maldonado had no input into the original application, and knows very little about San Joaquin's proposed operation; she couldn't name San Joaquin's officers or directors; she doesn't know who the Secretary of the Corporation is or the person authorized to sign checks; she can't say whether she'll have to make additional capital contributions or not; though she fully needs her present salary of $25,000 per year to live on, she hasn't discussed what she would be paid at the station; and she doesn't know how many people will be on her staff.

40. Again (see para. 33 *supra*) North Star's claims have a certain pull. But again they must be rejected - this time as *non-sequiturs*. It's true that Alicia Maldonado displayed an abject ignorance of San Joaquin's proposed operation. But it does not follow that that makes her integration pledge less sincere. She now has an opportunity, apparently for the first time, to secure an ownership interest (albeit only 6%) in her career field. She has made an unequivocal commitment to serve as San Joaquin's full-time program director ". . .knowing that it is likely to involve commitments in excess of 40 hours per week." These facts outweigh those that North Star developed on cross-examination.

41. Next, San Joaquin intends to fully integrate 6% stockholder *Albert Edward Reyes* into its day-to-day operations as News and Public Affairs Director. Reyes was born in Fullerton, California in 1952. He has lived in Fresno about 14 years. He is a U.S. citizen, and an Hispanic. He attended Fresno City College and wrote for the college newspaper while attending.

42. When he was 20 years old the Channel 30 news department hired him. Reyes was the first Chicano that news department ever hired. After 6 1/2 years at Channel 30, Reyes went to the NBC affiliate, Channel 24. There two of the documentaries he produced won the Gold Medallion Award from the State Bar of California.

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[9] In fact, Applebaum recruited all five Hispanic stockholders just before the "B" cut-off date. In an obvious predesignation attempt to shore up San Joaquin's integration proposal, he offered them a combined 26% of the stock; he integrated three of them full-time into the proposed day-to-day operations; and he tried to integrate a fourth stockholder (Macias) on a part-time basis. (But see Finding 50 *infra.*)

43. In November 1980, he left Channel 24 to become a producer with a national education television series produced out of Austin, Texas. Then in May 1982, the California Public Broadcasting Commission awarded Reyes a fellowship to work for one year at Radio Bilingue, licensee of non-commercial FM Station KSJV in Fresno. That fellowship expired in May, 1983. As KSJV's Executive Producer he was involved in public relations, and he wrote funding proposals for station projects. Reyes has not been active in civic affairs.[10]

44. San Joaquin also intends to fully integrate 6% stockholder *Hugo Morales* into its day-to-day operation as its Business Manager. In that capacity Morales would set up personnel policies and allocate resources. He would have someone working with him who would be in charge of accounting and handling checks and payroll.

45. Morales was born in the State of Oaxaca in Mexico. He is a U.S. citizen and a full-blooded Mixtec Indian. He received his education at Harvard College and Harvard Law School where he graduated in 1975. He currently resides at 826 N. Van Ness, Fresno, California.

46. Morales began his broadcast career in 1970 while at college. He was the Bi-Lingual Program Director of radio station WHRB, Cambridge, Massachusetts. In 1977 he moved to Fresno. There he organized and became President of Radio Bilingue, Inc. Radio Bilingue began to provide a non-commercial educational FM service on Station KSJV in July 1980. Morales presently serves as Radio Bilingue's Executive Director and as KSJV's station manager. Morales has not been active in civic affairs.

47. North Star has leveled an attack on Hugo Morales' integration claim similar to those it made on Alicia Maldonado (paras. 38–40 *supra*) and Albert Reyes (Footnote 9 *supra*). This attack lacks persuasion and Morales' integration claim will be credited.

48. Finally, San Joaquin seeks half-time integration credit for 6% stockholder *Ysidro Macias*. Macias would be San Joaquin's General Counsel. He was born in 1944 in Salinas, California, and is a United States citizen and an Hispanic. He has lived in Fresno since 1973.

49. Macias commits himself to serve as San Joaquin's General Counsel. He says, "[h]e will be available for whatever contractual issues the station would have with employees, with outside agencies, and with local government." He represents that "[w]hen the construction program gets under way, he will handle questions of local zoning and use of real property" and that "he is committing

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[10] North Star attacked Albert Reyes' integration claim on the same basis it attacked Alicia Maldonado's claim (see paras. 38–40 *supra*). However, the allegations it raised against Maldonado were far stronger than the ones against Reyes. Consequently, Reyes integration claim will also be credited.

half of his practice to being able to handle any and all legal questions that would come up concerning the station."

50. San Joaquin's half-time integration claim for Ysidro Macias will be rejected. His proposed position as General Counsel doesn't involve any significant policy or management role; it doesn't arise out of other program-related work at the station; and his commitment is too amorphous to warrant any credit. While Macias testified he would be available to work up to 20 hours a week, it would be on an on-call basis from his office. And he frankly indicated that "if there is no legal work that I am called upon to do, then I wouldn't do any."

Auxiliary Power

51. San Joaquin, in its application as amended June 30, 1982, proposes to install and maintain an auxiliary power generator to assure the station's continuous operation if the power fails.

52. North Star did not include a source of auxiliary power in its application. However, after the case was designated for hearing, it exchanged an exhibit (North Star Ex. 3) in which it indicated it would install auxiliary power at both the studio and the transmitter site. That exhibit was rejected for being at variance with the application.

Minority Preference

53. North Star can claim no minority preference.[11] Three of San Joaquin's principals - Maldonado, Morales, and Reyes - who in the aggregate hold 18% of its voting stock and who would be fully integrated into San Joaquin's day-to-day operations, are Hispanic. Non-integrated stockholders Macias (6%) and Fernando Aguirre (2%) are also Hispanic. In addition Alicia Maldonado is entitled to an additional enhancement factor for being a female.

54. On this same subject, North Star attempted to introduce a proposed comparative exhibit on the programming it intends to provide to the Hispanic community. That exhibit was rejected (Tr. 21–22).

Ultimate Facts and Preliminary Conclusions

1. North Star Communications, Ltd. (North Star) and San Joaquin Television Improvement Corporation (San Joaquin) each seek authority to operate a UHF television station on Channel 43 in Clovis, California. Only one can be granted. Under the standard

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[11] North Star belatedly asserted that Jack Burk should be given minority credit for being a one-eighth Cherokee Indian. But it offered no authenticated written data to support that assertion and its claim was rejected on grounds of variance (Tr. 664–665).

comparative issue we must determine who will be awarded the grant.

2. The two applicants will be analyzed under the criteria set out in the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393. There the Commission indicated that the required comparison should be directed toward two primary objectives: (1) Selecting the applicant who will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant who will offer the best practicable service to the public.

3. *Diversification of Control*. Since diversification constitutes a primary objective in the licensing scheme, it is a factor of primary significance.

4. North Star will be awarded a significant preference under this factor. Neither North Star nor any of its general or limited partners have any ownership interest in any broadcast facility or any other media of mass communications.

5. On the other hand, three of San Joaquin's principals have interests in existing media close to Clovis. Hugo Morales, a 6% stockholder, and San Joaquin's proposed Business Manager is the Executive Director of Radio Bilingue, Inc. (RBI). RBI is the licensee of noncommercial FM station KSJV in nearby Fresno, California and the permittee of a new noncommercial FM station at Modesto, California. The Modesto FM station's signal will be heard in Clovis and KSJV can be heard in Modesto. The proposed Clovis Channel 43 signal will also reach Modesto. In addition to being RBI's Executive Director, Morales is KSJV's station manager. Although it is not close to Clovis, Morales is also Chairman of the Board of the permittee of noncommercial educational FM station KHUM, Denver, Colorado.

6. In addition, Alicia Maldonado, a 6% stockholder, and San Joaquin's proposed Program Director is a member of RBI's Board of Directors as is Ysidro Macias, a 6% stockholder, and San Joaquin's proposed General Counsel.

7. *Best Practicable Service*. Comparing North Star and San Joaquin under the Commission's second objective is a somewhat closer affair. Turning first to quantitative integration, North Star claims and will be credited with 100% full-time integration of ownership with management, while San Joaquin can only be credited with 87% full-time integration. This gives North Star a clear quantitative difference.

8. Qualitatively, Jack Burk, one of North Star's two integrated General Partners is a local Clovis resident and has a substantial amount of broadcast related experience. Wesley Burroughs, the other integrated General Partner lives in nearby Fresno (within the proposed service area). But he has no broadcast experience. Neither Burk nor Burroughs can be credited with civic participation.

9. San Joaquin's major integrated stockholder, Arnold Applebaum (69%), is a proven successful executive. But he has no broadcast

experience, and he is not a local resident. The mere fact that, if San Joaquin is granted, Applebaum will move to a place accessible to Clovis doesn't strengthen the quality of his integration to any extent.

10. The other 18% of San Joaquin's integration claim are qualitatively strong. Alicia Maldonado, a 6% stockholder and San Joaquin's proposed Program Director, is a Fresno resident (within the proposed service area) and has nine years of TV broadcast experience. While she isn't active in civic affairs, the quality of her 6% integration is greatly enhanced since she is an Hispanic woman.

11. Hugo Morales, a 6% stockholder and San Joaquin's proposed Business Manager is a Fresno resident with a considerable amount of broadcast experience. In fact, he organized Radio Bilingue, Inc. (see Conclusion 5 *supra*) and presently serves as its Executive Director and Station Manager of its Station KSJV. While Morales isn't active in civic affairs, the quality of his 6% integration is enhanced since he is an Hispanic.

12. The other integrated 6% stockholder, and San Joaquin's proposed News and Public Affairs Director, Albert Edward Reyes, is also a Fresno resident. He too has a considerable amount of broadcast experience - mainly programming production. While he isn't active in civic affairs, the quality of his 6% integration is enhanced since he is an Hispanic.

13. In addition, San Joaquin's proposal is residually enhanced because two non-integrated stockholders, Ysidro Macias (6%), and Fernando Aguirre (2%) are both Hispanic.

14. When the two integration proposals are compared, North Star is entitled to a distinct integration preference over San Joaquin. North Star has clear quantitative advantage (13%). Its 100% integration is buttressed by local residence, and the broadcast related experience of one of its two General Partners, Jack Burk.

15. On the other hand, San Joaquin's integration strength resides principally in 18% of its stock. Alicia Maldonado (6%), Albert Reyes (6%), and Hugo Morales (6%) would each bring local residence, broadcast experience, and minority/female enhancement to San Joaquin's day-to-day integration. And, as noted, Macias (6%) and Aguirre (2%) residually enhance it. But this is not nearly enough to match North Star's strength. Stated another way, when Arnold Applebaum recruited the five Hispanics mentioned above (see Footnote 9 *supra*) he greatly strengthened San Joaquin's proposed integration. But the recruitment was a case of too-little, too-late. North Star still has the superior integration proposal.

16. One more matter must be considered under the best practicable service objective: auxiliary power. San Joaquin proposes an auxiliary power source. North Star doesn't. So San Joaquin merits a minor preference under this factor.

Ultimate Conclusion

17. North Star prevails over San Joaquin under the standard comparative issue. It is entitled to a significant preference under the primary diversification of control objective. And its qualitative and quantitative integration advantages outweigh the minor preference San Joaquin obtains under the auxiliary power criterion. So North Star would also bring the best practicable service to the public.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, North Star Communication, Ltd.'s application (BPCT-820510KJ) IS GRANTED; and San Joaquin Television Improvement Corporation's application (BPCT-820510KI) IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

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[12] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

San Joaquin TV Improvement Corp.
Comparative Hearing
Diversification, of Control of Mass Media
Reconsideration, Petition for, Denial of

Review Board denied reconsideration of its Decision, FCC 83R-91, released November 16, 1983. Winning television applicant has a diversification preference because principals of competing applicant have controlling ties to noncommercial broadcast stations within proposed service area.
–*San Joaquin TV Improvement Corp.*
BC Docket No. 82–552

FCC 84R–14

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

SAN JOAQUIN TELEVISION IMPROVEMENT CORPORATION Clovis, California	BC Docket No. 82–552 File No. BPCT-820510KI
NORTH STAR COMMUNICATIONS, LTD. Clovis, California	BC Docket No. 82–553 File No. BPCT-820510KJ
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: February 22, 1984; Released: February 27, 1984)

BY THE REVIEW BOARD:

1. The Review Board has before it a petition for reconsideration of its *Decision*, FCC 83R-91, 54 RR 2d 1206, released November 16, 1983, filed December 19, 1983 by San Joaquin Television Improvement Corporation (San Joaquin), an opposition thereto filed January 9, 1984 by North Star Communications, Ltd. (North Star), and San Joaquin's reply filed January 23, 1984.[1]

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[1] Also before the Board are North Star's motion to strike filed December 28, 1983, its motion for extension of time filed December 28, 1983, San Joaquin's opposition pleadings to the preceding motions, North Star's January 4, 1984 petition to withdraw its motions, and North Star's January 9, 1984 petition for leave to late-

2. In its reconsideration pleadings, San Joaquin reargues many (if not most) of the decisional points raised before the Board in its original exceptions to the *Initial Decision*. But, apart from the infusion of new and additional counsel, no new changed circumstances are reflected in these latest pleadings—only the brimming vitality of a fresh paladin charging through issues already encountered and subdued in our prior action. While San Joaquin's tenacity in its quest for the television frequency at contest may be otherwise admirable and certainly confirms its sincerity in coveting the available channel, such tag-team tactics are inconsistent with the regimen of sound or fair administrative process which holds that the extraordinary burdens of reconsideration will not be keyed for a mere recrudescence of settled issues. *5 KW, Inc.*, 44 FCC 2d 30 (Rev. Bd. 1973) *quoting WWIZ, Inc.*, 37 FCC 2d 685, 686 (1964), *aff'd sub nom. Lorain Journal Company* v. *FCC*, 351 F.2d 824 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1966). Consequently, we decline San Joaquin's energetic invitation to parry with it in the manner of a *de novo* review of the case, and dismiss the great bulk of its ambitious petition as legally defective. However, in one small but not unimportant aspect, we will take this opportunity to expatiate further on the core question of whether the active and controlling association with one or more noncommercial broadcast stations by an applicant's principals is a factor to be weighed under the comparative selection criterion known generally as "diversification."[2]

3. In our *Decision*, and as did the ALJ, we took cognizance of the fact that several of San Joaquin's proposed principals—representing at least 18% of its entire ownership—were at times relevant herein officers and/or directors of Radio Bilingue, Inc., a not-for-profit corporation which holds the licenses for two other broadcast stations, both of which would be in the service area of the instant television facility. *See Decision*, paras. 3–4. We also observed that the organizer

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file. The latter two petitions will be granted. Previously, by letter dated January 17, 1984, we granted San Joaquin an extension of time until January 23, 1984 in which to file its reply pleading.

In addition, San Joaquin filed a petition for leave to amend on December 19, 1983, seeking to report that two of its principals are no longer directors of Radio Bilingue, Inc. North Star opposed acceptance of the amendment on the ground that an impermissible comparative upgrading otherwise would result. We will grant the petition for reporting purposes only and will permit no comparative upgrading based thereon.

[2] In its essential *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965) ("*Policy Statement*"), the Commission declared:

> *Diversification of control of the media of mass communications.*—Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.
>
> As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications.

and founding president of Radio Bilingue, and currently its Executive Director as well as Station Manager of its Station KSJV-FM, Fresno, California (one of those Radio Bilingue stations within the proposed television station's service area), Hugo Morales, is also a San Joaquin principal. Additionally, Morales is the Board Chairman of the permittee of a radio station in Denver, Colorado. *See id.* Relying on the ALJ's interpretation of the *Policy Statement* and other pertinent authority, including the Board's own decision in *Milam & Lansman*, 6 FCC 2d 198 (Rev. Bd. 1966), we took into consideration the Radio Bilingue positions and activities of the San Joaquin principals, and generally affirmed the ALJ's award of a diversification preference to its opponent, North Star. *See Decision*, paras. 4, 14. Adverting chiefly to the case of *Loyola University*, 12 RR 1017 (1956), *rehearing denied*, 12 RR 1116a (1957)[3] as representative, San Joaquin asserts that "[u]nder a number of Commission policies, noncommercial stations are exempt from general diversity considerations."[4] We will examine that case and San Joaquin's rather broad assertion of the applicable rule of law.

4. It is true that in the 1956 comparative case of *Loyola University*, *supra*, the Commission determined not to attribute either "several scholarly publications" or "3 non-commercial educational FM broadcast stations" held by the Society of Jesus to the Loyola University applicants, even though several priest/directors of that university were simultaneously members of the Society. It said:

> We note here parenthetically that evidence was placed in the record relative to several scholarly publications of the Society of Jesus, of which members of the Loyola applicant are priests; and also in the record are 3 non-commercial educational FM broadcast stations, none of which are within the New Orleans Province. In both of these connections, the Commission feels that the publications concerned and the educational type of facility involved are not proper for consideration under the diversification factor in the first instance . . . .

12 RR at 1112. Nonetheless, we do not regard *Loyola University* as controlling here for the following reasons.

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[3] *Aff'd sub nom. Noe* v. *FCC*, 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 925 (1959).

[4] San Joaquin Petition at 9. Earlier in its petition, San Joaquin argued in the alternative that "[e]ven if the *Milam & Lansman dicta* were otherwise persuasive, the facts of the instant case are completely distinguishable," *id.* at 3, in that the Radio Bilingue positions and activities of its principals are of a "temporary and limited nature," *id.* at 2. Its factual arguments in that regard, aside from coming very late in this proceeding, were essentially considered in our *Decision* (*see id.*, paras. 3–4 and attendant footnotes), and will not be readdressed. In short, though, as officers and/or directors of Radio Bilingue at the time of the comparative hearing, the relevant San Joaquin principals cannot now disclaim responsibility for the operation of the Radio Bilingue station(s); it is to the directors of non-profit entities that the Commission looks for *de jure* and *de facto* control of the station, *see Loyola University*, *supra*, 12 RR at 1024, 1109, for there are no other "owners" to charge.

5. Initially, that case preceded both the *Policy Statement* and *Milam & Lansman* by nearly a full decase. In its plenary *Policy Statement*, the Commission securely embraced the spirit of the First Amendment, and in the clearest possible terms emphasized the comparative primacy of "[d]iversification of control of the media of mass communications," *see* 1 FCC 2d at 394–395. Nowhere in the *Policy Statement*, our most comprehensive manual, does the Commission parse the many categories of media voices into profit and nonprofit classes. Nor can it be seriously argued at this late date that noncommercial stations do not constitute prominent media voices in the community, for whatever the "educational" character of noncommerial stations at their genesis, that character has been indelibly altered by myriad developments over the ensuing decades. For example, the Public Broadcasting Act of 1967[5] greatly strengthened noncommercial broadcasting by providing for annual public appropriations to support a wide variety of noncommercial licensees, to wit:

> (A) a public broadcast station; (B) a non-commercial telecommunications entity; (C) a system of public telecommunications entities; (D) a nonprofit foundation, corporation, institution, or association organized primarily for educational or cultural purposes; or (E) a State or local government (or any agency thereof), or a political or special purpose subdivision of a State.

47 U.S.C. §392(a)(1). Congress also expanded the scope of such stations from a purely "educational" charter to one which embodies all aspects of our "cultural" environment, *see id.* at §396(a)(1). In the wake thereof, the Commission has followed—and, in fact, often *led*—the transformation away from the time when noncommercial broadcasting stations were simply electronic appendages of academia. Thus, the Commission explained its 1976 rejection of any minimum requirement that noncommercial programming be "instructional" because—with specific reference back to the bygone *Loyola University* era—it found that the requirement merely "relate[d] back to the inception of the educational broadcast service as an adjunct to university and school teaching facilities." *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 58 FCC 2d 526, 541 (1976). Recognizing that noncommercial stations had evolved into an important cultural and informational medium of expression, the Commission thereupon imposed programming and other regulatory responsibilities virtually indistinguishable from those obtaining to ordinary commercial stations. *See id.* at 540–543. It has since cemented its view that noncommercial stations have reached full-fledged broadcast media status, observing concisely:

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[5] Pub. L. No. 90–129, 81 Stat. 365 (1967) (*codified* 47 U.S.C. §390 *et seq.*). The significant change in noncommercial broadcasting occasioned by that legislation is noted by the court in *League of Women Voters of California* v. *FCC*, *infra* note 7.

> From the perspective of the Commission, public broadcasting is characterized largely by a negative distinction, *i.e.* public stations are not operated by profit seeking organizations nor supported by on-the-air advertising.

Public Radio and TV Programming, 87 FCC 2d 716, 732 (1981).[6] Hence, in terms of programming (and other basic operational respects as well[7]), noncommercial stations "have developed substantially in recent years and now provide a broad range of services to the listening public," *id.*, and there can be no current doubt that contemporary noncommerial stations constitute an important and effective media voice in the communications community.

6. In light of these considerations, we did not, and do not now, believe that it is reasonable or appropriate to categorically ignore an applicant-principal's controlling ties, if any, to noncommercial broadcast stations, for such stations plainly have a vital impact on the matter of overall diversification of control of our various media voices. In its pleadings, San Joaquin has again furnished not a single persuasive rationale for holding otherwise.[8] We do nonetheless recognize that non-commercial stations are not yet in all respects fungible with commercial stations or, generally, as formidable a force in the electronic media environment. *See, e.g., FBC, Inc.*, FCC 83R-75, released October 6, 1983 (Rev. Bd.), *recon. denied*, FCC 83R-104, released January 9, 1984. Noncommercial stations do not, for example, provide a competitive outlet for commercial voices, either mercantile or political, and their audience ratings have not come close to parity with their commercial counterparts. It was for that precise reason that we did not fully adopt the ALJ's characterization of North Star's diversification preference as "significant" (*I.D.*, Concls., para. 4), but merely held that San Joaquin's ties to the Radio Bilingue outlets rendered it clearly less desirable from the standpoint of seeking a wider diversification of media voices, particularly in view of the proximity of those other broadcast media operations to

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[6] Even that distinction is no longer absolute. *See generally Educational Broadcast Stations*, 90 FCC 2d 895 (1982) (relaxing fundraising restrictions on noncommercial licensees, particularly in response to the addition of 47 U.S.C. §§399 A & B).

[7] *See, e.g., Transmission of Teletext*, 53 RR 2d 1309 (1983) (noncommercial stations may commercially transmit teletext); *FM Subsidiary Communications Authorizations*, 53 RR 2d 1519 (1983) (noncommercial stations may commercially lease SCA frequencies). *See also League of Women Voters of California* v. *FCC*, 547 F.Supp. 379 (C.D.Cal. 1982) (striking 47 U.S.C. §399 ban on editorializing by noncommercial stations), *probable jurisdiction noted*, 51 U.S.L.W. 3633 (1983).

[8] In what North Star has accurately labeled a "red herring" (North Star Opposition at 10 n.14), San Joaquin baldly asserts that a recognition of noncommercial stations under the general diversity criterion "would deprive noncommercial stations of access to the same limited pool of experienced minorities and females." San Joaquin Petition at 10. No support, of course, is furnished for its condescending proposition that the universe of qualified minority and female applicants is "limited," and San Joaquin's tendentious assertion to that effect is indeed redolent of "herring"—or worse.

the station here sought. *See Decision*, para. 4. In fact, had San Joaquin's other media ties been to nearby *commercial* stations, its diversity penalty here would have been absolutely dispositive. We therefore reaffirm our support of the ALJ's award of a diversification preference to North Star.

7. ACCORDINGLY, IT IS ORDERED, That the petition to withdraw filed January 4, 1984 by North Star Communications, Ltd. IS GRANTED, and its December 28, 1983 motions to strike and for extension of time ARE WITHDRAWN; and

8. IT IS FURTHER ORDERED, That the petition for leave to late-file filed January 9, 1984 by North Star Communications, Ltd. IS GRANTED, and the opposition to petition for reconsideration IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed December 19, 1983 by San Joaquin Television Improvement Corporation IS GRANTED, and the amendment IS ACCEPTED on the condition that no comparative upgrading will be permitted based thereon; and

10. IT IS FURTHER ORDERED, That the petition for reconsideration filed December 19, 1983 by San Joaquin Television Improvement Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

Common Carrier, Ownership of Facilities

Notice of Proposed Rulemaking adopted regarding blanket Section 214 authorization for provision by a telephone common carrier of lines for its cable television and other non-common carrier services outside its telephone service area.
–*Section 214 Authorization*

FCC 84–19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area	CC Docket No. 84–28

NOTICE OF PROPOSED RULEMAKING

(Adopted January 16, 1984 Released January 19, 1984)

BY THE COMMISSION:

I. *Introduction*

1. Broadly interpreted, Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, requires carriers to obtain Commission authorization prior to construction, acquisition, or operation of any line. This requirement applies when a carrier's line is used for a common carrier service, and may apply when a carrier's line is used for a non-common carrier service. This section has been used to authorize cable television channels in some cases. Applications have been filed when a telephone common carrier or its affiliate seeks to construct, acquire, or operate a cable television channel.[1] The

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[1] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (Commission has authority under the Communications Act to regulate cable television systems); General Telephone Co. of California, 13 FCC 2d 448 (1968), *aff'd sub nom.* General Telephone Co. of California v. Federal Communications Commission, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969) (requirement of Section 214 authorization when telephone carriers construct, acquire, or operate channels for common carrier service to cable television systems); Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Systems, 21 FCC 2d 307 (1970) (Final Report and Order in Docket 18509), *aff'd sub nom.* General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 854 (5th Cir. 1971) (requirement of Section 214 authorization when a telephone carrier constructs, acquires, or operates channels

applicant may seek to determine what programming is to be carried (i.e., provide cable television service), or to make the facility available to others under tariff for transmission of material of the customer's choice (i.e., provide common carrier channel service). Also, the applicant may seek to provide cable television channels in the telephone carrier's telephone service area or outside that area. On the other hand, authorization is not required when an entity not affiliated with a telephone common carrier constructs, acquires, or operates a cable television channel and provides cable television service via that channel. Section 214 only pertains to the activities of common carriers. The provision of cable television service is not a common carrier activity.[2]

2. Section 214 applications are reviewed by the Commission to determine whether "the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . . ." 47 U.S.C. § 214(a). The Commission annually processes about twenty applications of telephone common carriers or their affiliates seeking Section 214 authority to provide channels for their own cable television services outside their telephone service areas. Service does not begin until these applications are granted. We know of no such application which was denied. It seems that the filing and processing of these applications impose unnecessary costs on consumers, carriers, and the Commission. It is costly for carriers to prepare these applications (see 47 C.F.R. § 63.01), and processing them imposes costs on the Commission. The time required to approve these applications may increase carriers' costs by impairing planning of construction and service, delaying revenues, and handicapping carriers in competition with non-carriers for cable service outside the carriers' telephone service areas. Processing time imposes additional costs on consumers, by delaying the provision of cable service in an area and lessening competition between carriers and non-carriers to provide cable service in an area. In *Eagle Telecommunications*,[3] we directed the staff to prepare a Notice of Proposed Rulemaking to reassess application of Section 214 to carriers proposing to provide channels for their own cable television service outside their telephone service areas.

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for service to a cable television system operated by the carrier or an affiliate); Elimination of the Telephone Company—Cable Television Cross-Ownership Rules for Rural Areas, 88 FCC 2d 564 (1981), *petition for review pending sub nom.* National Cable Television Association v. Federal Communications Commission, D.C. Cir. Case No. 82–1058 (filed January 14, 1982) (requiring telephone carriers to state in their applications for authority under Section 214 to construct, acquire, or operate channels for service to a cable television system operated by the carrier or an affiliate whether it relies on the rural exemption).

[2] Southwestern Cable, *supra* note 1, 392 U.S. at 164–72; Federal Communications Commission v. Midwest Video, 440 U.S. 689, 709 (1979).

[3] FCC 83–459 (released November 7, 1983).

3. We hereby propose to grant blanket Section 214 authorization, to the extent that such authorization is necessary, for provision by a telephone common carrier or its affiliate of channels for its cable television service outside the carrier's telephone service area. The proposal also covers under blanket Section 214 authorization other lines supplied by a carrier or its affiliate outside its telephone service area and used to provide non-common carrier services. For example, such lines may form a customer's private microwave system, or may be constructed and sold to a customer to link it to a telephone switching office.

II. *Costs and Benefits of Blanket Authorization*

4. Requiring prior authorization of a carrier's facilities under Section 214 can serve to limit duplicative, unnecessary, or inefficient facilities that would inflate the carrier's rate base and lead to higher charges to users of common carrier services.[4] We also have used scrutiny under Section 214 to enforce the policies of Title II of the Communications Act, such as nondiscrimination in common carrier services.[5] These reasons for regulatory scrutiny of a carrier's facilities do not pertain when a carrier constructs channels for its own cable television service or lines for a non-common carrier service outside its own telephone service area.[6] The cost of the facilities will not raise rates for common carrier services.[7] There may be some extent to which lines for one carrier's cable television service or other non-common carrier service in an area duplicate the common carrier facilities of another carrier serving that area. Yet, we know of no application under Section 214 denied for this reason, and we do not scrutinize the construction by non-carrier entities of lines for cable television service or other services to prevent such duplication.

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[4] *See* Long-Range Regulation of AT&T's Basic Domestic Interstate Services, 48 Fed. Reg. 51340, 51344 & n.45 (November 8, 1983) (Notice of Inquiry).

[5] *Id.* at 51345.

[6] "The Commission has long recognized that particular market needs for telecommunications services may be met by means other than traditional common carrier offerings." Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1246 (1982), *citing* General Mobile Radio Service, 13 FCC 1190, 1209–11 (1949); Above 890, 27 FCC 359 (1959); Domestic Fixed Satellite Service, 22 FCC 2d 86 (1970); Land Mobile Radio Service, 51 FCC 2d 945 (1975), *aff'd sub nom.* National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976).

[7] Under our decision in Second Computer Inquiry, 77 FCC 2d 384, 476, *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer Communications Indus. Ass'n. v. Federal Communications Commission, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983), a carrier's costs of providing lines for non-common carrier services and costs of providing such services must be entered on books of account separate from those for its common carrier services. Accordingly, such costs should not affect the revenue requirement for the carrier's common carrier services.

5. We have used the requirement of Section 214 authorization to implement certain competitive policies regarding channels for cable television service.[8] However, these policies do not require a showing in line-specific applications that the public interest would be served by authorizing a carrier's channels outside its telephone service area used for its own cable television service. For example, we ordered that any authority to a telephone company to provide channels for common carrier cable service should be conditioned on a showing that the customer(s) had available pole attachment rights or conduit space at reasonable charges and without undue restrictions on the uses that may be made of the channels by the customer.[9] In addition, we required a carrier seeking to provide channels for its own cable television service in its telephone service area to show that it qualifies for the rural exemption or other good cause.[10] The blanket authorization proposed in this Notice would not impair the Commission's ability to implement these policies.[11]

6. In sum, we tentatively find that Section 214 filing procedures constitute an unnecessary regulatory burden when applied to carriers' lines used for their own cable television services or other non-common carrier services outside of their telephone service areas. We tentatively conclude, to the extent that any authorization is required by Section 214, that all such facilities serve the public convenience and necessity. As noted in paragraph 2 *supra*, this regulatory filing burden imposes costs on consumers, carriers, and the Commission. The Commission has the discretion to grant blanket Section 214 authorizations.[12] We propose to grant blanket Section 214 authorization, to the extent that such authorization is necessary, for provision by a telephone common carrier or its affiliate of lines for its cable television service or other non-common carrier service

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[8] *See* General Telephone Co. of the Southwest, *supra* note 1, 449 F.2d at 856–58.

[9] Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Systems, *supra* note 1, 21 FCC 2d at 326; 47 C.F.R. § 63.57.

[10] Elimination of Telephone Company - Cable Television Cross-Ownership Rurals for Rural Access, *supra* note 3; 47 C.F.R. §§63.54–63.56.

[11] In Eagle Telecommunications, *supra* note 3, para. 15, we stated that a carrier applying to provide channels for its own cable television service in its telephone service area must "supply sufficiently detailed information as to its proposed service area to enable the Commission to know where the carrier contends there is no independent system under construction or in existence and consequently where it will be eligible for the rural exemption." We do not rely on information in other Section 214 applications to verify such claims; we do not receive Section 214 applications from non-carrier suppliers of channels. Rather, we rely on evidence brought forth by independent systems in response to such claims. *Id.*

[12] *See* Competitive Carrier Rulemaking, 77 FCC 2d 308 (1979) (Notice), 85 FCC 2d 1 (1980) (First Report), 84 FCC 2d 445 (1981) (Further Notice), 91 FCC 2d 59 (1982) (Second Report), *reconsid.*, FCC 83–69 (released March 21, 1983), 48 Fed. Reg. 46791 (October 14, 1983) (Third Report), 48 Fed. Reg. 52452 (November 18, 1983) (Fourth Report); Long-Run Regulation of AT&T's Basic Domestic Interstate Services, *supra* note 4, 48 Fed. Reg. at 51346.

outside its telephone service area. The proposed rule change is shown in the attachment.

III. *Regulatory Flexibility Act Analysis—Initial Analysis*

7. We conclude that the proposed change contained herein will have a positive economic impact on a substantial number of small entities, within the meaning of Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. §605(b) (1982). We are issuing this Notice of Proposed Rulemaking to receive public comment on our intention to grant telephone companies proposing to provide lines for their own cable television services or other non-common carrier services outside of their telephone service areas blanket authorization under Section 214 of the Communications Act of 1934, 47 U.S.C. §214. Our objective is to compile a sufficient record to implement this proposal. The legal basis for this proposal is contained in paragraph 9.

8. The Commission proposes to extend its deregulatory program to the situations where telephone common carriers provide cable television services and other non-common carrier services outside of their telephone service areas. The proposed rule will apply equally to all telephone common carriers and their affiliates—small business entities as well as large corporations—and should aid all such carriers by eliminating costs and delay in the certification process. No alternative that could be considered would be less burdensome.

IV. *Ordering Clauses*

9. This proceeding is instituted pursuant to Sections 4(i), 4(j), 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 214 and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. §553.

10. Comments must be filed on or before March 1, 1984. Reply comments will be due on or before March 30, 1984.

11. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully

covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number of proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. §1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

12. In accordance with the provisions of 47 C.F.R. §1.419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C. 1919 M Street, N.W.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Attachment

The proposed rulemaking would amend Part 63 of Chapter 1 of Title 47 of the Code of Federal Regulations as follows:

§ 63.08 [New]

"No telephone common carrier or its affiliate is required to file for authority pursuant to 47 U.S.C. § 214 and 47 C.F.R. § 63.01 to provide lines for its own cable television service or for any other non-common carrier service outside of the carrier's telephone service area."

Forfeiture Mitigation, Request Denied

Request denied for recission of violation of Commission's Rules regarding signal leakage and harmful interference to amateur radio operations.
–Sonic Cable TV

FCC 83–570

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Liability of:
SONIC CABLE TV

Grover City, California	CA0032
Arroyo Grande, California	CA0026
Pismo Beach, California	CA0038

For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted: December 1, 1983 Released: December 7, 1983)

BY THE COMMISSION:

1. The Commission has before it: 1) a Notice of Apparent Liability (hereinafter Notice) dated October 15, 1982, addressed to Sonic Cable TV (here-inafter Sonic), and Sonic's responses to the Notice dated December 1, 1982 and January 19, 1983.

2. The Notice in the amount of $6000 was issued by the Commission as a consequence of Sonic's apparent failure to maintain its signal leakage within the Commission's proscribed standard of 20 microvolts per meter measured at ten feet, as well as for its apparent failure to correct harmful interference to amateur radio communications.[1] Sonic has filed two responses to the Notice asking for its rescission based upon various procedural and substantive grounds.[2]

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[1] See Sections 76.605(a)(12) and 76.613(b) of the Commission's Rules, respectively.

[2] In addition to its responses, Sonic has filed the following pleadings which are not contemplated by the Commission's rules. On October 4, 1982 Sonic filed an "Emergency Request to Delete Cable Item 2 from October 6 FCC Open Meeting". The Commisson denied this motion en banc at its October 6, 1982 meeting. Sonic also filed an "Emergency Motion to Vacate Notice of Apparent Liability." In view of our decision today this motion need not be addressed and is accordingly dismissed. Furthermore, Sonic filed a "Petition to Request Completion of Service of Notice and/or (2) For Extension of Time for Response." As noted *infra*, the Commission granted both of these requests in the course of this proceeding.

3. In its responses, Sonic maintains that the Notice should be rescinded because it contains an erroneous date which should have read January 25, 1982 instead of January 25, 1978. In this regard, Sonic argues that since a forfeiture is a penal action ". . . in the nature of an information or indictment" such an error is fatal to the Notice's validity. It next contends that its due process rights have been abridged because the original Notice issued by the Commission did not contain an appended response form, privacy notice, self addressed envelope, and summary of the actions it may take in response to the Notice under Section 1.80 of the Commission's Rules. Sonic also asserts that the Notice is defective since it lists the community of Pismo Beach in its caption and no violation of the Commission's Rules occurred in this locality. Furthermore, Sonic maintains that the Commission in issuing the subject Notice selectively prosecuted it in an effort to implement a pending proposed rule-making by "raised eyebrow." This proposed rulemaking filed by the American Radio Relay League, RM 4040, accepted for filing February 5, 1982, would, if adopted, prohibit cable operators from using certain frequencies used by amateur radio stations. Additionally, Sonic argues that it has not violated Section 76.613(b) because it has taken appropriate steps to eliminate harmful interference as required by this rule section. Furthermore, Sonic alleges that in responding to a request for more information filed by it on November 1, 1982, the Commission withheld information pertaining to whether it had knowledge of the existence of "illegal taps" as well as other matters. Lastly, Sonic, in the alternative, requests in essence that the Commission grant it a waiver to allow it to harmfully interfere with amateur radio stations.

4. Sonic's arguments both procedural and substantive in support of rescission are not persuasive. Sonic has chosen to raise a plethora of unmeritorious arguments to mask its rule violations. Sonic maintains that Notices of Apparent Liability are criminal in nature, and consequently the erroneous date contained in the subject Notice is fatal to its validity. Contrary to Sonic's assertion, Notices of Apparent Liability are civil matters. *Faith Center, Inc.*, FCC 78–434, 69 FCC 2d 1123 (1978). Moreover, the disputed Notice would stand even if the erroneous date were stricken. The subject Notice does not rely upon the erroneous date to substantiate the finding of harmful interference. With respect to the signal leakage violations set out in the Notice, there are three other dates which sustain this violation. In any event, the date in question was corrected by an erratum issued by the Commission on November 19, 1982 well within the one year statute of limitations applicable to the underlying rule violations. *Drexel Hill Associates, Inc.*, FCC 75–1010, 34 RR 2d 1534 n. 1 (1975). Furthermore, Sonic was informed of the correct date by Commission letter of November 9, 1982.

5. Sonic also maintains that its due process rights have been

abridged as a consequence of not receiving certain appendices to the Notice. In response to Sonic's contention that the original notice did not contain the aforementioned appendices, in an abundance of caution, the Commission in each instance served Sonic with the relevant forms and extended the thirty day response period thereby assuring Sonic's procedural rights. With regard to its first response to the Commission's Notice, Sonic maintains that it was prejudiced because the response was submitted prior to its receipt of a privacy notice. However, this argument is without merit since privacy notices are only applicable to individuals. *Cell Associates, Inc. v. National Institutes of Health, Department of Health, Education and Welfare*, 579 F.2d 1155 (9th Cir. 1978).

6. Sonic's contention that the Notice is defective because it lists a community in its caption where no violation took place is also without merit. The subject Notice clearly sets forth in which communities the violations occurred. The Community of Pismo Beach was included in the caption as a means of helping to identify the cable television system responsible for the subject rule violations.[3]

7. We also find Sonic's defense of selective prosecution to be without merit. Sonic contends that the Commission has failed to prosecute other cable systems for the same violations and that the Commission's real motive behind the issuance of the subject notice is to force Sonic to discontinue use of certain frequencies. Although the Commission's limited resources may result in violators going unpunished, this does not mean we cannot impose sanctions against those we find violating our rules. *KMAP, Inc.*, FCC 74–473, 46 FCC 2d 978 (1974). Additionally a defense of a selective prosecution requires a showing that a subject has been singled out in bad faith because of such impermissible considerations as race, religion or desire to prevent an exercise of a constitutional right. *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974). The Commission issued the relevant Notice in response to Sonic's apparent violations of the Commission's Rules. Sonic has claimed that the Commission's motive in issuing the Notice is an attempt to implement a yet unadopted proposed rulemaking prohibiting cable systems from using certain frequencies. However, Sonic's liability is not based upon its use of any frequency nor must it discontinue the use of any frequency to comply with the Commission's rules cited in the Notice.

8. Sonic also maintains that the Commission has withheld information from it in this proceeding. We find this claim surprising in light of the Commission's response to Sonic's Freedom of Information Request filed in this proceeding. By letter dated

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[3] The Commission's Rules define a cable system on a headend basis. Our records indicate that the subject cable system serves Grover City, Arroyo Grande as well as Pismo Beach, California.

November 1, 1982, the Commission granted Sonic's request and made all the factual information it sought available for its review.

9. Sonic also contends that it has not violated Section 76.613(b) of the Commission's Rules because it has taken appropriate steps to eliminate harmful intereference. Sonic's contention ignores the fact that it was informed of the presence of harmful interference to amateur radio operators as early as December of 1981. It is evident, as reflected in the Commission's Notice, that Sonic did not eliminate the harmful interference subsequently found by the Commission's Field Operations Bureau. Moreover, we note that Sonic has not disputed its violations of Section 76.605(a)(12) of the Commission's Rules regarding signal leakage.

10. Lastly, Sonic has asked in essence that the Commission grant it a waiver to allow it to harmfully interfere with amateur radio stations. Sonic, in support of its petition, maintains that a waiver is warranted since it was in operation prior to one of the principal complainants, since amateur radio operators are engaged in an avocation rather than a vocation, and because there is no other channel upon which it can operate. Thus, Sonic maintains that amateur radio operators ". . . should be viewed as having put up with the basic undesirability of having to share spectrum."[4] Sonic's request for waiver is inappropriate in this proceeding. What is under consideration in this proceeding is Sonic's past violations of our Rules. The issuance of a waiver would not cure these violations. Moreover, Sonic by requesting a waiver to harmfully interfere with amateur radio operators asks the Commission in large extent to consider those very issues raised in the outstanding request for rulemaking filed by the American Radio Relay League. RM 4040, *supra*. However, we do note that Sonic's waiver request fails to recognize that cable systems by their very nature are not meant to share spectrum. Cable television systems emply closed coaxial cable delivery systems which are not intended to radiate frequencies over the air. It is for this reason that they may generally use most frequencies without prior Commission approval.

11. In view of the foregoing, we are not persuaded that recission of the forfeiture assessed in the Notice of Apparent Liability is warranted.

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, That Sonic Cable TV, Inc. FORFEIT to the United States the sum of six thousand dollars ($6000.00) for willful or repeated violations of Sections 76.605(a)(12) and 76.613(b) of the Commission's Rules. Payment of the forfeiture may be made

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[4] The Amateur Radio Service is a duly licensed service of this Commission and pursuant to Section 97.61 *et al.*, amateur radio operators are authorized to use specific frequency bands in the radio spectrum. Also, the Amateur Radio Service is an internationally recognized user of certain frequencies.

by mailing the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. If this forfeiture is not paid within thirty (30) days of the release date of the Memorandum Opinion and Order, the case will be referred to the Department of Justice for collection, pursuant to Section 504(a) of the Communications Act, as amended.

13. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order shall be sent by Certified Mail - Return Receipt Requested to Sonic Cable TV.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Programming Children's

Report and Order adopted terminating proceeding regarding TV programming for children. Given the totality of video programming sources and their offerings for children, constitutional concerns regarding interference with licensee's programming discretion, and regulatory anomalies that often result from inflexible standards, the Commission did not adopt specific quantification rules. It did, however, continue to recognize the obligation of the b/cer to serve children.

–TV Programming for Children
Docket 19142

FCC 83–609

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Children's Television Programming and Advertising Practices

Docket No. 19142
RM-1569
RM-3333

REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: December 22, 1983 Released: January 4, 1984)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT; COMMISSIONER PATRICK NOT PARTICIPATING

1. Now before the Commission for consideration are the comments filed in response to the *Notice of Proposed Rule Making* (*"Notice"*) in the above-captioned proceeding concerning television programming for children.[1] The *Notice* is the most recent step in a thirteen year inquiry into television programming and advertising addressed to children.

History Of The Proceeding

2. In 1970, Action for Children's Television ("ACT") submitted a petition proposing a rule requiring commercial television broadcasters to provide, on a weekly basis, minimum amounts of age-specific programming for children. In 1971, we adopted our *First Notice of*

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[1] 75 F.C.C. 2d 138 (1980), 45 Fed. Reg. 1976 (published January 9, 1980).

Inquiry to explore and define the fundamental issues in children's television.[2] A Children's Television Task Force ("Task Force") was setup at that time to help achieve these goals. We concluded the inquiry in 1974 with the issuance of a *Report and Policy Statement* (*"Policy Statement"*).[3] The *Policy Statement* specifically asked commercial television licensees to: (1) make a "meaningful effort" to increase the amount of programming for children; (2) air a "reasonable amount" of programming for children designed to educate and inform and not simply to entertain; (3) air informational programming separately targeted for both preschool and school-age children; and (4) air programming for children scheduled during weekdays as well as on weekends. Commercial television broadcasters also were expected to: (1) limit the amount of advertising in children's programming;[4] (2) insure an adequate separation between program content and commercial messages; and (3) eliminate host-selling and tie-in practices.[5]

3. On appeal, the U.S. Court of Appeals affirmed the *Report and Policy Statement*.[6] The Court held that the Commission's decision to provide policy guidelines and not to adopt specific regulations governing advertising and programming practices for children's television was a reasoned exercise of its broad discretion.

4. In 1978, the Commission re-established the Children's Television Task Force to inquire into the effectiveness of broadcast industry self-regulation under the *Report and Policy Statement*.[7] The Task Force was to inquire into children's programming and advertising practices and investigate the impact of new technologies and alternative sources of programming on the availability of children's programming. The Task Force presented its report to the Commission on October 30, 1979. It concluded that broadcasters had not complied with the programming guidelines of the *Policy Statement* but, in general, had complied with the advertising guidelines.[8]

5. In coming to its conclusion concerning programming, the Task

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[2] 28 F.C.C. 2d 368 (1971), 36 Fed. Reg. 1429 (published January 29, 1971).

[3] 50 F.C.C. 2d 1 (1974), 39 Fed. Reg. 39396 (published November 6, 1974).

[4] The broadcast industry adopted advertising restrictions that were endorsed by the Commission in the *Policy Statement*. Both the National Association of Broadcasters ("NAB") and the Association of Independent Television Stations ("INTV") planned a phased-in reduction that by January, 1976, would restrict advertisements to 9 minutes and thirty seconds on weekends and 12 minutes during the week.

[5] The *Policy Statement* was reaffirmed on reconsideration. 55 F.C.C. 2d 691 (1975).

[6] *Action for Children's Television v. F.C.C.*, 564 F.2d 458 (D.C. Cir. 1977).

[7] *Second Notice of Inquiry* in Docket No 19142, 68 F.C.C. 2d 1344 (1978), 43 Fed. Reg. 37136 (published August 21, 1978).

[8] A summary of the Task Force's conclusions and recommendations is contained in Appendix A, along with a summary of comments initially filed in response to the 1980 *Notice of Proposed Rulemaking*, 75 F.C.C. 2d 138 (1979), 45 Fed. Reg. 1976 (published January 9, 1980).

Force examined the amount of time commercial broadcasters devoted to children's programs during the 1973–74 broadcast season, the season prior to the *Policy Statement's* adoption, and the 1977–78 season, the most recent complete broadcast season at the time its report was written.[9] This study revealed a 7.2% increase in the overall amount of time commercial broadcasters devoted to children's television programming. Although an increase was noted, the Task Force nonetheless determined that licensees had not complied with the guideline for overall amount of children's programs because: (1) the increase in the average per-station amount of time devoted to children's programs was due to the increased broadcast of syndicated programs carried on independent stations; (2) independent stations exist primarily in large markets; (3) network affiliates' time devoted to children's programs remained essentially the same between the two broadcast seasons; and (4) reliance on syndicated rather than local programming increased at both independent and network-affiliated stations. The Task Force also concluded that: (a) no significant increase had occurred in the number of educational and instructional programs aired for children; (b) licensees had not made an effort to air age-specific programs; and (c) the proportion of children's programs scheduled on the weekend had decreased somewhat but nearly half of children's programs were still shown on weekends.

6. In the opinion of the Task Force, the economic incentives of the advertiser-supported broadcasting system do not encourage the provision of specialized programming for children. Advertisers desire the largest possible audience of potential buyers for their advertised products, but young children have an influence on decisions to buy only a relatively few advertised products. Thus, the amount of money spent on children's advertising appears to be small relative to the amount spent advertising to adults. The Task Force believed that the small numbers of children and the limited appeal of the children's market to advertisers, combined with the small number of outlets in most markets, create incentives for the commercial television system to neglect the specific needs of the child audience.[10]

7. As a result of the Task Force Report, the Commission adopted the *Notice of Proposed Rule Making* herein. The *Notice* contained the following five options for possible Commission action:

> (1) Rescind the *Policy Statement* and find that commercial television broadcasters no longer have any specific obligation to serve the child audience. Instead, reliance would be placed on other program sources.

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[9] Television Programming for Children: A Report of the Children's Television Task Force, Federal Communications Commission, Vol. IV, October, 1979.

[10] Television Programming for Children: A Report of the Children's Television Task Force, Federal Communications Commission, October 1979, Vol. II.

(2) Because of concerns about the constitutional limits to Commission authority, maintain or modify the *Policy Statement*.

(3) Adopt mandatory programming rules on an interim basis.

(4) Adopt quantitative renewal processing guidelines for children's programming.

(5) Increase the number of video outlets per market to increase the amount and diversity of programming serving children.

8. In response to the *Notice of Proposed Rule Making*, voluminous comments were filed in the summer of 1980. A broad range of interests made their views known and indicated their concerns. Broadcast associations, networks, licensees, advertising groups and program producers and distributors represented the broadcast industry. Public interest and media organizations. educational associations, religious groups and individuals represented non-industry views.

9. A thorough discussion of the comments filed in response to the *Notice of Proposed Rule Making* appears in Appendix A* of this document. Nevertheless, it is appropriate at this juncture to briefly discuss the commenters' rebuttal to the Task Force's conclusion that broadcasters had failed in making a meaningful effort to increase the amount of programming for children. By its own extensive study, the National Association of Broadcasters ("NAB") confirmed the data developed in the Task Force report. It disagreed, however, with the conclusion drawn from these results. NAB argued that the Task Force report, in fact, showed a significant increase in the amount of time devoted to children's programs in the top 52 markets which account for 66.6% of the total 2-11 year old population. Further, NAB noted that if public broadcasters were included, the average amount of time per week devoted to children's programs would increase from 11.23 hours to 15.09 hours. Thus, NAB, as well as the networks, argued that a substantial amount of programming is available to children.

Recent Proceedings

10. On March 28, 1983, the Commission reopened the children's television proceeding.[11] We sought to update the record to enable us better to resolve the important questions raised by the *Notice*. Therefore, we held an *en banc* meeting on April 28, 1983, to hear oral presentations from 24 participants and permitted the submission of additional written comments from interested parties.[12]

11. As in 1980, presentations (oral and written) were made on behalf of the broadcast industry, as well as non-broadcast interests.

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[11] 48 Fed. Reg. 18860, published April 26, 1983.

[12] *See* Appendix B* for a listing of those who made oral presentations and Appendix C* for a listing of parties filing supplemental comments.

Commercial broadcasters continue to acknowledge their "public service obligation" to develop and present programs which serve the unique needs of the child audience. To support the proposition that such programming in fact has been and will continue to be aired, the networks and the National Association of Broadcasters exhibited videotapes of past and future programs of interest to children. Broadcasters continue to believe that responsible self-regulation and reliance upon marketplace forces are the most effective means of meeting their obligation to the child audience. According to ABC, the most important development that has occurred since comments were last submitted (1980) in this proceeding has been the steady progress of marketplace changes that continue to enhance the overall diversity and availability of children's programming. It is alleged that a veritable explosion is occurring in the use of various visual and audio devices to be used with or in addition to the home television receiver. Broadcasters submit that videocassettes and discs make available a wide range of programming directed to children. They assert that the playback and "time-shift" capability of this technology offers new and exciting possibilities for tailoring programming to the needs of children. In addition, these parties note that the number of children's features available on basic and pay cable services,[13] as well as the number of children's programs offered by public broadcasting,[14] has grown substantially in recent years.

12. Broadcasters also direct our attention to those Commission actions taken in the last two years that individually and cumulatively offer the opportunity for more and diverse children's and other specialized programming: 1) the authorization of a direct broadcast satellite ("DBS") service; (2) the authorization of a new low power television service; and 3) the further deregulation of the subscription television ("STV") service. The industry also notes that other technologies, such as Multipoint Distribution services, Satellite Master Antenna TV, Teletext and Videotext, undoubtedly will give rise to still more ways in which children receive programming. Therefore, the parties conclude that commercial television should not be viewed in isolation.

13. While there was some minor disagreement as to whether the *Policy Statement* should be clarified, phased-out or eliminated, the industry generally oppose a more expansive regulatory approach. The parties contend that rules are unnecessary because: (1) the

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[13] The Disney Channel, a pay cable service, which debuted earlier this year joined other children's programming initiatives such as Nickelodeon, Calliope and Carousel, offered by Warner Amex, USA Cable and Showtime, respectively.

[14] CBS submits that it is in no sense an abdication of the responsibilities of commercial broadcasters to point out the special role of public television in this area. It argues that public stations were established to serve needs that may not be fully met by the commercial system.

youth audience has been well served by television;[15] (2) there is no factual basis for the imposition of mandatory programming rules with respect to children's television;[16] (3) the adoption of rules compelling the presentation of mandated amounts of particular types of programming at specified times would be arbitrary, as well as an infringement of the editorial discretion of broadcasters in violation of the first amendment and the Communications Act,[17] and (4) more hours of children's television actually might mean less in the sense that increased quantity may precipitate a decrease in the quality of such programming.

14. ABC and Forward Communications suggest that we issue a general reaffirmation of the principles of the *Policy Statement*, clarify licensee obligations under the *Policy Statement* based upon a more realistic assessment of practical conditions and public interest needs, and adopt a regulatory program looking toward a gradual phase-out of the *Policy Statement* commensurate with marketplace developments. They contend that emphasis should be placed upon broad affirmative licensee responsibilities. The obligation to serve children should be coupled with a renewed emphasis on licensee discretion. They further recommend that *Policy Statement* lanuage suggesting a special status for "educational" or "instructional" children's programming should be deleted. It is argued that entertainment-oriented features often can be highly effective in serving children. Further, certain family-oriented program material, not primarily designed for children, but nevertheless having special appeal to youthful viewers, should be recognized as reflective of a broadcaster's overall effort in this area. The Commission is also asked to discard the concept of subgroupings of the child audience. It is argued that broadcasters and the marketplace should be permitted to develop the appropriate mix of school-age, teenage and pre-school programming. ABC and Forward Communications Corporation recommend a gradual phase-out of the *Policy Statement* and a total reliance upon marketplace forces. The American Association of Advertising Agencies, Inc. ("AAAA"), submits that because industry self-regulation is proving itself a most effective means of serving the interests of children, there is no basis upon which to support either a

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[15] Most of these parties give a detailed description in their written comments updating their efforts in programming for children. They also argue that the Task Force survey seriously understated the children's programming available in the markets selected for study.

[16] CBS, as well as other parties, submit that throughout the week, television offers a wide variety of prorams defined by the Commission as "children's programs," as well as many other programs recognized by parents, educators and critics as highly worthwhile for young audiences.

[17] These parties also contend that expanded renewal reporting in the area of children's programming would not only fail to achieve any legitimate public interest objective, but it would directly undermine the basic regulatory purpose behind the current short form renewal application.

continuation of the *Policy Statement* or promulgation of additional policies or guidelines in this regard.[18]

15. Public television representatives do not address the question of regulating children's TV. Rather, they express their commitment to children's programming but submit that all broadcasting, not just the public sphere, is responsible for serving children. To improve the relationship between television and education, John Murray of Boys Town suggests the establishment of a National Endowment for Children's Telecommunications which would be largely supported by public and private philanthropy through a consortium of foundations, professional organizations and the broadcast industry.[19]

16. Generally, non-industry interests request that the Commission adopt rules relating to children's television programming and advertising practices, as well as establish license renewal guidelines. They would have the Commission require: (1) more programming designed for children; (2) the scheduling of children's programs throughout the week; (3) the presentation of programs designed for specific age groups of children;[20] and compliance with the advertising standards set forth in the 1974 *Policy Statement*. According to these organizations, the rationale for regulating children's television is fourfold: (1) industry "backsliding;" (2) the abolition of the NAB Code; (3) the adoption of the short-form renewal; and (4) *Policy Statement* standards which are too broad to be enforceable.

17. In challenging the concept of industry self-regulation, commenters assert there has been a decline in the amount and availability of programming for the child audience. Of particular concern to ACT is the lack of regularly scheduled weekday children's programs. Also, WATCH submits there has been an overall reduction in the diversity of shows for children. It also argues that the demise of "regulation by raised eyebrow" has removed the major incentive for broadcasters to serve children.

18. Commenters are quite concerned that the abolition of the NAB Code will result in overcommercialization during the broadcast of children's programs.[21] They argue that the Commission took no regulatory action in regard to advertising standards for children

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[18] The AAAA submits that children have strong likes and dislikes and will not repudiate their favorite programs. In fact, it argues that most programs watched by children are not produced for them.

[19] The National Education Association recommends the creation of a Temporary Commission on Children's Television to provide a forum for dialogue in a non-adversarial atmosphere.

[20] WATCH recommends that the Commission require each station to air 5 hours of programming per week for pre-school children and 2 ½ hours per week for elementary school age children.

[21] In March 1982, the U.S. District Court for the District of Columbia found that certain provisions of the NAB Code could violate the Sherman Antitrust Act. A consent decree through which NAB agreed to stop enforcing all the challenged provisions was then entered (November 1982). *United States v. National*

because the broadcast industry adopted commercialization limits for children's television. Without this Code, it is submitted, overcommercialization again may appear. Therefore, commenters assert a rule limiting commercial material during children's programs should be adopted.

19. Public interest groups also argue that the "new" simplified renewal application is yet another reason for regulating children's programming. In March 1981, the Commission reduced the broadcast license renewal application (Form 303) from a document requesting, among other things, information on children's television, to a postcard format (simplified renewal application) consisting of five questions, none of which concern children's programming.[22] Commenters argue that without industry-wide data comparable to that previously gathered by means of the renewal application, the Commission cannot monitor how well licensees and the marketplace serve children. Further, without this data, it is alleged, the public is without the necessary information to assist the Commission in ascertaining whether its licensees are meeting their public interest responsibilities.

20. Two commenting parties, Citizens Communications Center ("CCC") and WATCH are concerned particularly with what they consider to be vague standards governing children's programs. CCC asserts that the precise numerical standards used in rules are not nearly as important as the need for some consistently applied quantitative measure that would provide certainty and guidance to the industry and the public. CCC cites *FCC v. Pacifica Foundation* [23] as holding that the governmental interest in the well-being of its youth justifies restrictions on broadcasters' first amendment rights. It submits that the Commission's authority to establish and favor program categories has been upheld in the face of first amendment challenges.[24] CCC further asserts that the establishment of mandatory minimal percentages is not constitutionally suspect because it does not prohibit the broadcast of other programming by station licensees. Thus, it would provide the public with additional information rather than repressing existing sources. Any "chilling effect"

Association of Broadcasters, 536 F.Supp. 149 (D.D.C. 1982). Soon after this final judgment, NAB abolished the entire Code.

[22] *Revision of Applications for Renewal of License*, 46 Fed. Reg. 26236, published May 11, 1981. Five percent of all license renewal applicants are randomly selected each renewal period and required to fill out an Audit Form (FCC Form 303-C) that contains questions on, among other things, children's programming and advertising practices.

[23] 438 U.S. 726 (1978).

[24] Cited in support of this position is *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975), in which the court upheld the Commission's decision to permit exemptions to the prime time access rule ("PTAR") for licensees choosing to offer network news, public affairs or children's programming in the PTAR time slots.

upon broadcasters' ability to provide other programming is seen as minimal. CCC also submits that the first amendment benefits to the public clearly outweigh the broadcaster's first amendment claims.

21. In reply comments, ABC argues that the request for mandatory standards regarding advertising for children goes beyond the established parameters of the current proceeding. It further asserts that the elimination of the NAB Code has not impaired the implementation of its own more vigorous children's television standards, and contends that expanded renewal reporting in the area of children's programming not only would fail to achieve any legitimate public interest objective, but would undermine the basic regulatory purpose behind the current short-form renewal application.

22. In reply to comments made by the broadcast industry, ACT argues that the responsibility for children's television programming rests squarely on the shoulders of each broadcast licensee. Therefore, relying on other sources of children's programming is contrary to the law and antithetical to the interests of children. Under the theory of "market" responsibility, maintains ACT, the fact that some stations serve children would act as a disincentive to any expansion of children's programming.[25] Furthermore, this approach would destroy licensee accountability to the public and to the Commission. ACT further argues that shifting responsibility for children's programming to public broadcasting would have an adverse effect on the diversity of children's programming. Nor, in ACT's view, should this responsibility be shifted to the new technologies. First, consumers would incur substantial costs (installation and monthly charges) to subscribe to these services. Second, because these new technologies are not subject to the public interest standard of the Communications Act, there is no guarantee that they will serve children. ACT argues that the question is not what kinds of children's programming are being offered, or how good such programs are, but rather how much time is allocated to children's programming, and when such programs are scheduled. ACT acknowledges that family programming may be appropriate for child viewers and be enjoyed by them. However, it contends that family programming is not designed specifically for children and thus does not necessarily meet their special needs.

Discussion

23. In attempting to resolve the issues in this proceeding it is appropriate that we turn first to the recommendations of the Children's Television Task Force. The Task Force, believing that

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[25] Under the "market" theory, the *Policy Statement* would be applied on a market basis so that programming responsibility could be shared. Therefore, if one station in a market was providing children's programming, there would be no reason for all stations in that market to provide parallel programming.

greater attention to the needs of the child audience was desirable, focused on three broad options to improve the situation: 1) mandatory programming requirements, 2) increased governmental funding (or other incentives) for the production and distribution of such programming, and 3) increasing the number of video outlets so as to improve the commercial incentives for serving subgroups in the audience and to increase the available distribution paths for children's programming. The recommended mandatory programming requirement could be enforced either through a specific rule or through processing guidelines applied to the renewal of station licenses. The Report focused on the amount of programming available on a per station basis and found that amount inadequate. It reviewed briefly the jurisdictional and constitutional objections to the adoption of mandatory program requirements and found them not to preclude the adoption of requirements and it recommended that such requirements be adopted.[26]

24. Our weighing of what we think are the relevant considerations in this proceeding lead us to believe that the recommended mandatory programming obligations are undesirable and should not be adopted. The other recommendations of the Task Force, relating to public funding for the production and distribution of informational and instructional children's programming and for the creation of additional video outlets and commercial funding mechanisms, we agree with fully. While issues relating to public funding are beyond our jurisdiction, we have moved aggressively to create new video outlets.[27]

25. In reaching our decision in this matter it should be made clear at the outset that we recognize the special character of the child audience, including particularly the younger portion of that audience. Television programming is undoubtedly an influential factor in childhood development, and economic factors relating to the distribution of advertiser supported programming for children are likely to vary somewhat from those associated with the distribution of programming for adults. In these respects we are not in

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[26] The Task Force believed that the advertising guidelines in the Policy Statement had been complied with and therefore recommended no changes in this area. Because of this, the Commission specifically stated in the *Notice of Proposed Rule Making* that policies regarding advertising were not in question in this proceeding. Accordingly, we regard requests for changes in these policies to be beyond the scope of this proceeding.

[27] The Task Force specifically urged a relaxation of the subscription television rules. The paucity of options for direct viewer payments for programs, it was suggested, limited audiences in expressing the intensity of their preferences for particular types of programs. This, it was believed, decreased the availability of programming for children. The Commission's *Third Report and Order in Docket 21502*, 47 Fed Reg. 30069 (1982) eliminated all of the subscription television restriction with which the Task Force had expressed concern.

fundamental disagreement with the findings of the Task Force and with the views of most of the commenting parties in this proceeding.

Availability of Children's Programming

26. In several important respects, however, we disagree with the predicate upon which the Task Force based its recommendations and on which many parties base arguments supporting mandatory programming requirements. The first of these disagreements relates to the issue of the actual availability of programming for the child audience. In particular, we find the Task Force conclusion erroneous for its failure to properly consider: (1) the growth in number of commercial stations and their increased receivability; (2) programming on noncommercial stations; (3) cable program services; and (4) child viewing of "family" oriented television. These failures undermine the conclusions drawn by the *Report*. The second disagreement concerns practical, legal and policy problems with our ability to adopt and enforce programming obligations.

27. With respect to the first of these concerns, the Task Force focused its attention on the amount and scheduling of children's programming by the average commercial station. Based on this focus, it found a need for a more aggressive regulatory stance to replace that previously followed. In our view, the Task Force's focus in this regard was too narrow. We must, of course, exercise our regulatory authority with respect to individual licensees. The objective of the Commission's involvement, however, is to assure that the telecommunications system as a whole is responsive to the needs of the public. It is therefore appropriate to look to that system as a whole in reviewing developments relating to the accessability of programming for the child audience.

28. The data developed by the Task Force reveal a 7.2 percent increase, during the years studied (1973–74 and 1977–78), in the amount of time commercial broadcast stations, on average, devoted to children's programming.[28] Not focused on, however, was the fact that the total number of stations licensed was increasing. During the time since this docket was commenced, the total number of licensed commercial stations increased from 668 (1971) to 844 (1983), an increase of approximately 25 percent.[29] Moreover, the reach of these

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[28] Task Force Report, Volume 4, p. 39. This increase, significantly, resulted largely from a 36 percent increase in the children's programming broadcast by independent stations. This is highly supportive of one basic theses of the Task Force Report; namely, that the growth of alternative video outlets would result in market segmentation and a resultant greater attention to specific subgroups within the audience such as the child audience. There are now independent stations in 86 different markets serving 78 percent of all TV households.

[29] The changes that have taken place in the video marketplace over the course of the last decade are set forth in some detail in the Commission's *Tentative Decision and Request for Further Comment in BC Docket 82–345*, 48 Fed. Reg. 38020 (1983).

stations was being constantly increased through more efficient operations (increased power and antenna height), through reductions in the UHF handicap, and through increased cable television carriage. Summary data show the average television household now receives 9.8 signals, an increase of 3 (44 percent) since 1970. Thus, not only was the average output of children's programming per station increasing but the average number of stations accessable to the child viewer was increasing as well.

29. Even this broader focus, which includes the totality of programming from all commercial stations however, is unduly narrow since it excludes from the product available to the child audience that which by almost any measure must be the most significant programming—that produced and distributed by the public broadcasting system. This system was created precisely for the purpose of supplementing the commercial broadcasting system and in specific recognition of the desirability of providing public support to increasing the availability of programming that might not be fully supported by commercial incentives. The public broadcasting system has recognized this mandate with respect to the broadcasting of children's programming and its successes in this field have been broadly recognized. The Corporation for Public Broadcasting has recently recognized children's programming as the number one priority in its Program Fund guidelines.[30] We do not expect the public broadcasting system to bear the sole responsibility for meeting the needs of the child television audience or its existence to provide an excuse for the failings of the commercial broadcasting system. But we do not believe it appropriate to exclude its output from consideration as a significant factor in measuring the extent to which the needs of this audience are being served. The Commission has reserved channels in its television broadcast table of allotments for the specific use of noncommercial broadcasting stations so that the public would have access to the kinds of informational, instructional, and cultrural programming that these stations deliver. Today, almost 300 stations—more than a quarter of all the licensed television stations—are of the noncommercial variety. The Public Broadcasting System, during the 1982–83 season provided stations in the public broadcasting system, reaching over 90 percent of all television households, with some 2,050 hours of children's programming.[31]

We recognize, of course, that the Task Force itself was addressing a narrower time period but believe the broad trends involved are more clearly reflected in data covering the longer period.

[30] September 15, 1983, resolution of the Board of Directors of the Corporation for Public Broadcasting.

[31] Status Report of Public Broadcasting 1980, Corporation for Public Broadcasting; Public Television Programming by Category (FY-1982) prepared by Research and Programming Services, Corporation for Public Broadcasting contracted project, 1983. *See also*, Nielsen Television Index, Special Analysis for Corporation for

30. An additional important component of the national children's television programming market consists of the programming available to the child audience from nonbroadcast sources, including in particular that programming available over the facilities of cable television systems. At the time this proceeding was commenced, cable television served a relatively limited segment of the population, and its function was almost entirely the retransmission of over-the-air television broadcast signals. Cable television now passes some 54 percent of all homes and cannot be avoided in any assessment of the accessability of programming to the child audience. The most popular of the cable television delivered children's programming services, "Kidstime," reaches some 18 million subscribers or about 20 percent of all television households. Millions of households have access to other children's program services by cable as well, including "Nickelodeon," (14 million subscribers) and the recently inaugurated Disney Channel which already reaches over 300,000 subscribers. Some programming on the major pay cable television program services, such as Home Box Office, is also directed to the child audience.[32]

31. In addition to excluding from its principal focus programming available from public television and from nonbroadcast sources, the Task Force also focused, in a definitional sense, on only a portion of the totality of programming that is viewed by and is responsive to the needs and interests of the child audience. That is, its concern was principally with that programming defined in the Commission's rules as children's programming.[33] This definition

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Public Broadcasting, 1983. It is worth noting that when the reservation of channels for noncommercial stations was first proposed, a suggestion was made that, as an alternative, each commercial station should be forced to make a certain amount of time available "for educational purposes in the public interest as a sustaining feature." While refusing to accept the existence of educational stations as an excuse for commercial stations not complying with their obligations to the community, the Commission did reject this alternative proposal. The Commission both questioned the legal basis for such a rule and found it impractical stating: "A proper determination as to the appropriate amount of time to be set aside is subject to so many different and complex factors, difficult to determine in advance, that the possibility of such a rule is most questionable." *Sixth Report and Order in Dockets 8736 et al.*, 41 FCC 148, 163–4 (1952).

[32] Satellite Services Report, National Cable Television Association, December, 1983. A recent description of some of the children's program services offered on cable television systems (as well as of programs available from commercial networks, public television, and from syndication) may be found in Aimee Dorr "A Guide to the Best TV Shows for Children," *TV Guide*, Dec. 17, 1983, p. 4.

[33] *See Memorandum Opinion and Order in Docket 19142*, 53 FCC 2d 161 (1975). For some purposes other definitions were used that had essentially the same thrust. A separate concern with the definition relates to exclusion of teenagers from the child category. Because of this exclusion, Altman Productions, Inc., claiming that a significant regulatory bias against teenage programming has been created, requests rulemaking to eliminate this bias. Others have raised similar concerns. Commissioner Washburn, for example, in his separate statement at the time the 1979 *Notice* was issued suggested that: "The teenage audience is of equal, if not

covers only programs "originally produced and broadcast primarily for a child audience twelve years old and under." Explicitly excluded from coverage are programs that might be appealing to children and significantly viewed by them but which were, when produced, intended for a broader audience as well.[34] This exclusion of what has been broadly referred to as "family" programming, clearly resulted in an unduly narrowed definition of the programming of interest and value to the child audience. While the necessity of defining the scope of the statistical studies undertaken required some definitional cutoffs, it seems clear that by using limitations that excluded programs such as "The Wonderful World of Disney,"[35] that relevant programming of value could not be fully comprehended by the study. The problem, however, is more than just a statistical anomaly. Such a definitional limitation serves to encourage the broadcasting of programming that is likely, given the dynamics of program selection within the household, to have not only a smaller total audience but a smaller child audience. Moreover, it suggests that positive values should be associated with programs, directed to the child audience, whatever the social utility of those programs, while programs specifically designed to bridge age levels and be shared by parents and children are of lesser value on the regulatory scale. We believe it is important to take into account, in assessing the state of children's programming, highly rated family shows that draw both larger child audiences and mixed parent/child audiences. These programs, because they encourage interaction, rather than isolation of children and parents, are a valuable part of the overall program mix.

32. In sum, we cannot conclude that statistical studies of the Task Force or of the other commenting parties in themselves make out a case for increased regulatory concern or involvement. Properly viewed, the adaquecy of the programming to which children have access must be based on a consideration of the whole of the video distribution system. Viewing that system broadly and on an overall national basis, we find increases in the children's programming available from the average station, dramatic increases in the number of stations in operation, increases in the availability of these

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greater importance than pre-schoolers and grade schoolers." 75 FCC 2d at 158. We have no doubt that the needs of the teenage audience are significant and that this and many other subgroups within the audience merit consideration. There are questions of degree involved, however, and those factors that warrant some special concern for the child audience, even within the existing definition, appear to decrease with age. Moreover, attempts to define audience segments more particularly for regulatory purposes seem to us likely either to unduly involve this agency in scheduling decisions or to result in such inclusive categorization that the whole effort would be meaningless. Thus, we are not disposed to grant the Altman Productions request.

[34] Task Force Report, Volume IV, p. 13.

[35] See statement of Commissioner Washburn, concurring in part and dissenting in part, to the *Notice of Proposed Rulemaking*, 75 FCC 2d at 158.

stations through cable carriage and improved station facilities, increased availability of noncommercial programming made possible through the growth of the public broadcasting system, and increased viewing options provided to substantial portions of the population by the operation of cable television systems. In short, there is no national failure of access to children's programming that requires an across-the-board, national quota for each and every licensee to meet. We do not mean to suggest that these developments have satisfied all the demands for programming associated with the child audience or that they satisfy all legitimate regulatory concerns. We do not, however, take the existence of an unsatisfied demand in some situations to be evidence of a national market failure in regards to the production and distribution of children's television programming. In any situation where resources are limited and there are alternative demands placed on those resources, even the most perfectly functioning market will leave demands unsatisfied. Here, however, there is ample evidence of the system as a whole moving to respond to the unmet needs of this audience.

Issues of Law and Policy.

33. In addition to having these concerns with the factual predicate on which the recommendations for mandatory programming requirements were based, we also believe there are far more significant legal and practical difficulties associated with such requirements than have been acknowledged by their proponents. Parties urging such requirements have generally presented it as content neutral in terms of program quality. The question of program quality, however, is integral to the public interest issues in this proceeding. Much of the discussion associated with this proceeding by the parties and indeed by the Commission itself has addressed the overall quantity and scheduling of programming created for children. Yet, in fact, much of the actual concern has only to do with the availability of "quality" children's programming, programming that through its educational, intellectual, or cultural content is mentally or developmentally uplifting to the child audience. In fact, nothing in the record of this proceeding suggests that regulation would be desirable merely to force the broadcast of programming more likely to attract children into the television viewing audience and away from other pursuits or that would result in existing child viewers devoting a greater amount of time to viewing television. Indeed, much of the discussion of the need for increased regulatory involvement is intertwined with a more general discussion of whether television viewing is not in itself destructive of healthy child development. Much of the discussion of methods for providing the child audience with greater access to programming specifically produced for that audience is closely juxtaposed with extraordinarily

harsh criticisms of much of the very programming that has been specifically designed to attract this audience.[36]

34. Any analysis of the service received by the child audience that is entirely content neutral–which equates hours of television viewing with needs satisfaction–must conclude that this audience is well served. The inadequacy of this type of analysis leads us to conclude that the obligation broadcasters have to serve children cannot be rationally viewed as simply emphasizing a need to broadcast programming that appeals to or is produced for children. Certainly no structural or market failure can be found that warrants any special concern in this regard; children watch enough television, and no regulatory initiative need be introduced to get them to watch more. What is of special concern is that attention be paid to the developmental and emotional needs of children. Thus, we are not persuaded that efforts to adopt specific mandatory program hours obligations can achieve their intended objective in the absence of some control over or attention to the issue of quality. The Task Force itself, concludes, however, that the "fundamental issue of program quality cannot be addressed." Rather it attempted to use the term "educational/instructive"[37] as a proxy for that type of programming which would be socially beneficial to the child audience. It has argued that such a categorization is no more suspect or objectional than other categorization schemes already in existence and used for other regulatory purposes, such as, "news," "public affairs," "documentary," or "nonentertainment" programs.

35. We believe, however that an honest appraisal of the issue here under consideration suggests that the parallels are far from exact. In the categories now in use there is generally abundant room for argument with respect to programming on the fringes of the definition–for example, whether *Real People* is a documentary or

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[36] The filings of ACT and other parties in the early stages of this proceeding found many programs "fostering stereotypes, prejudices and questionable social standards." Weekend programs were found "more objectionable, violent, stereotyped and ad-ridden than family programs by far." Comment summary, *Policy Statement*, 50 FCC 2d at 26 and 21. See also, for example, Peggy Charren, "Children's TV: Sugar and Vice and Nothing Nice," *Business and Society Review*, No. 22, summer 1977. This article references a Michigan State University study that identifies weekend children's programming as "the most violent and most deceitful time block of programming on television." In children's programs, the article states: "Antisocial behavior patterns are often combined with racial and sexual stereotypes." *See also, Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties,* National Institute of Mental Health, (1982).

[37] The *Policy Statement* focused on the terms "educational or informational" while also speaking in terms of "cultural development" and cultivating the mind. 50 FCC 2d at 5–6. There is no existing definition of "informational" programming in the Commission's rules and the Task Force studies found no programs that it designated "educational", although programs in the "instructional" category were found. Task Force Report, Volume 2, page 22, note 22.

entertainment program. But the basic objective of the category is generally not disputed. The arguments presented relate to the programs on the margin. Here, however, it seems relatively clear that any "quality" program–especially if it had some entertainment value and were capable of attracting a significant child audience – would satisfy the basic objective of a children's program requirement. The issue of definition relates not so much to the fringes of the category but to the basic purpose of the category itself.[38] There are, as has been noted elsewhere, programs that are basically entertainment and that are also intended to be shared with an adult audience that nevertheless "teach millions of children each week fundamental truths about human relations and about the essential character of the American people."[39] Both the Commission and the courts have recognized that "judgments concerning the suitability of particular types of programs for children are highly subjective."[40]

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[38] Some evidence that issues relating to definitions and program quality are not simply part of a traditional "parade of horribles" brought out for rhetorical purposes only, may be gleaned from some contemporary experience in Australia. Regulatory authorities there, faced with the same kinds of concerns that are the subject of this docket but unconstrained by restrictions equivalent to the First Amendment and faced with far fewer broadcast outlets, have created a childrens program review committee and are developing standards to directly respond to issues of program quality. The program criteria suggest, for example, that programs must be "easily understood and appreciated by children," "fulfil[ ] some special need of children," and "contribute[ ] to the social, emotional or intellectual development of children." Australian Broadcasting Tribunal, *Notice of Proposed Determination of Children's Television Standards*, October 24, 1983. Although the words used in the Task Force Report recommendations and those in the Australian proposal are different, they would seem to be attempting to define the same types of programming. See also statement of Commissioner Washburn, concurring in part and dissenting in part, to *Notice of Proposed Rule Making*, 75 FCC 2d at 158: "The demarcation line between "instructional" and "entertainment" programming, in my judgment, is virtually impossible to draw." Justice Marshall, in his dissenting opinion in *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 615 (1981), in discussing the Commission's involvement with different types of program content, states "it is not immediately apparent, for example, why children's programming falls on the "nonentertainment side of the spectrum . . . "

[39] Statement of Commissioner Washburn, concurring in part and dissenting in part, to *Notice of Proposed Rulemaking*, 75 FCC 2d at 158. The point here, that the real public interest in children's programming involves attracting the child audience to programming that imparts a public interest or pro social message can be accomplished with adult or family programming as well or better than with specifically child programming, may be illustrated with an example. The Task Force Report states that, in the programming data being reviewed, it found the children's program with the highest child viewing, the *Scooby Doo-Dynomutt Show*, was seen by only half as many children as *Happy Days*, an adult program. Thus, for regulatory purposes licensees would receive no credit for *Happy Days*. Yet, it is reported that when the Fonz, the central *Happy Days* character, obtained a library card, many child viewers did likewise. Similarly, an "instructional" child's program with the ability to garner only a modest audience might have less public value than a higher audience appeal child's "entertainment" program with a social message embedded in it.

36. Because of concerns with problems of this type, we have believed, with only the rarest of exceptions, that selection of programming is a matter that should be decided by station licensees and by the audience through its viewing pattern voting. Program quota systems have been viewed historically as fundamentally in conflict with the statutory scheme of broadcast regulation. The question of whether certain socially desirable objectives in the broadcasting field might be achieved by such fixed program quotas is one that was presented to the legislature as the methodology of broadcast regulation was initally being considered. And the question of whether such programming requirements would be consistent with the system of broadcast regulation actually adopted has arisen periodically since, with in each instance a negative response. As radio broadcasting legislation was first being looked at, Congress considered and rejected proposals to allocate certain percentages of station time or a certain percentage of stations to particular types of programming. H.R. 7357, submitted prior to passage of the Radio Act of 1927, included a provision requiring stations to comply with programming priorities based on subject matter.[41] As the Supreme Court has noted:

> This provision was eventually deleted since it was considered to border on censorship. Congress subsequently added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence] with the right of free speech by means of radio communication."[42]

37. Based on the same type of concern, if not this precise legislative history, calls for programming requirements or quotas of one type or another have been repeatedly rejected. Their rejection at times in the past when only a small percentage of the stations now in operation had been licensed, raises significant questions as to how a change in the basic answer could now be justified. As noted above, the Commission rejected specific educational programming quotas when the television station table of assignments was adopted.

38. None of the Commission's or the courts' seminal statements concerning regulatory involvement in station programming went so far as to apply specific program quotas. Neither the 1929 Federal Radio Commission decision in *Great Lakes Broadcasting Co.*,[43] which discussed the expectation that licensees provide a balanced program

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[40] *National Association of Independent Television Program Producers and Directors v. FCC*, 516 F. 2d 539, note 21 (1975). The Court goes on it state that "A precise definition is probably unattainable, and, indeed undesirable. No one can set boundaries to the fantasy of a child's world." p. 539.

[41] H.R. 7357, 68th Cong., 1st Sess., § 1(B) (1924).

[42] (footnote omitted). *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 597 (1981).

[43] 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds* 37 F. 2d 993, *cert. dismissed*, 281 U.S. 706 (1930).

schedule designed to serve all substantial groups in their communities, nor the famous 1946 "Blue Book," nor the 1960 program statement with its fourteen program categories, including the first specific reference to programming for children, found it either desirable from a policy perspective or acceptable from a legal perspective to define by hours, schedule, and type any particular programming that should be broadcast to fulfill the public obligations of licensees.[44] Virtually every decision has focused on the tension between the statutory requirement that stations operate and be regulated in the public interest and the clear intention of the statute that the field of broadcasting is to be one of free competition, that licensees are to be accorded maximum editorial discretion, and that the Commission is given no supervisory control over programming and is prohibited from engaging in program censorship.[45] The somewhat nebulous nature of the obligations imposed were found, in each case, necessary to accommodate the conflicting requirements of promoting programming diversity and avoiding unnecessary restrictions on licensee discretion.

39. Numerous judicial opinions have also noted that serious First Amendment concerns are raised by such requirements. The courts have had occasion to speak to the issue several times in recent years. In 1978 the Commission refused to adopt quantitative program standards for television broadcasters involved in comparative renewal hearings. The argument was made that the absence of precise, i.e. quantative, standards raised First Amendment problems. The Court of Appeals responded, stating:

> As to petitioners' First Amendment claims, their approach would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting then any duties or guidelines presently imposed by the Commission. The Act provides broadcasters with broad programming discretion and prohibits the Commission from exercising the power of censorship.[46]

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[44] FCC, "Public Service Responsibility of Broadcast Licensees," (1946); *En Banc Programming Inquiry*, 44 FCC 2303 (1960).

[45] See also, separate statements of Commissioners Ferris, Washburn, Fogarty, and Brown to *Notice of Proposed Rule Making*, 75 FCC 2d 138, 153, 156, 165, 168 (1979).

[46] *National Black Media Coalition v. FCC*, 44 RR 2d 547, 551 (D.C. 1978). See also the statement of the Second Circuit Court of Appeals in *National Association of Independent Television Producers and Distributors v. FCC*, 516 F 2d 526, 536 (2nd Cir. 1975), concerning exceptions to the prime time access rules for network distributed children's programs, that "it may be that *mandatory* programming by the Commission even in categories would raise serious First Amendment questions." This statement was echoed by the District of Columbia Circuit of Appeals in its recent decision in the radio deregulation proceeding. *Office of Communications of the United Church of Christ v. FCC*, 707 F. 2d 1413, 1430 (D.C. Cir. 1983). In its "format" regulation decision, *WNCN Listeners Guild v. FCC*, 610 F. 2d 838, 850–51 (D.C. Cir. 1979), the Court stated, "There would no doubt be severe statutory and constitutional difficulties with any system that required intrusive governmental surveillance [or] dictated programming choices. . .."

40. Decisions refusing to adopt mandatory hour or percentage requirements have recognized not just the Constitutional fragility of such requirements but a practical policy component as well. In recent efforts to reform various policies relating to the regulation of radio broadcasting, the Commission noted that it "has not in the past, and will not in the future[,] focus on the total number of minutes or percentage of broadcast time devoted to issue oriented programming," and that "the number of minutes or percentage of broadcasting time devoted to such programming is largely irrelevant." *Memorandum Opinion and Order in BC Docket 79–219,* 87 FCC 2d 797, 809, 819 (1981) The Court of Appeals noted the logic of stressing the importance of factors besides quantity in its review of our decision, acknowledging that quantity alone may not be a measure of whether particular issues are being addressed in a meaningful fashion.[47]

41. More specifically with respect to the issue of children's programming, the Court of Appeals has acknowledged that rigid scheduling and quantity requirements would "not make sense from a policy standpoint." In a statement with which we agree, the Court stated that it failed to see the logic in policies that imply that a regular schedule of cartoons would satisfy the public interest when a more limited schedule of educational specials would not.[48] This raises again the issue of program quality. If it is assumed that station licensees will provide children's programming only involuntarily, then there is no logical way to disassociate quantity and quality. At a given cost, a specific regulatory requirement to respond to the needs and interests of children could be responded to either by the broadcasting of a limited number of more costly programs (more costly either in terms of production cost or lost audience) or a larger number of less costly programs. Although from the point of view of the station enterprise both approaches are equal in cost, rules that require or reward quantity create a strong bias to follow the "more programs lower cost" approach. Were there only a single broadcast outlet involved in each market, this conceivably might be a sensible course from a regulatory perspective. However, it does not appear to be a public interest maximizing approach where more outlets are involved. Proponents of mandatory requirements urge, however, that with mandatory time requirements at least some programming would be available and, having to provide that programming,

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These decision harken back to the Supreme Court's opinion in *FCC v. Sanders Brothers,* 309 U.S. 470 (1940) stating that the Communication's Act "does not assay to regulate the bussiness of the licensee. The Commission is given no supervisory control over programs. . . ."

[47] *Office of Communication of the United Church of Christ v. FCC,* 707 F. 2d 1413, 1433 (D.C. Cir. 1983).

[48] *Washington Association for Television and Children v. FCC,* 712 F. 2d 677, 684 (D.C. Cir. 1983).

stations would then have an incentive to make their best efforts to produce attractive programming. While we agree that stations would attempt to maximize their returns within the constraints imposed, the hypothetical example posed by the Court of Appeals—regularly scheduled cartoons receiving more credit than less frequently scheduled better quality programs—would still seem to be the likely result.

42. A practical concern of another type has been recognized as well. Rigid obligations relating to specific types of programming run contrary to efforts at specialization. As the Children's Television Task Force has suggested, such specialization as is made possible by the development of more programming outlets provides the surest long run chance of providing better service to all segments of society, including children. No sophisticated survey is required to observe that such specialization is occurring. During weekday mornings, independant (as well as public) stations in many markets compete for the child audience. Network affiliated stations concentrate on news and public affairs. On weekends, when network stations target the child audience, the independent (and the public) stations do not. As predicted, market segmentation leads to station specialization better serving the needs of the entire viewing public. Program quotas, in the absence of an extraordinarily complicated allocation mechanism, would work fundamentally against efforts to align commercial incentives with quality service to the child audience.[49] Regulations running against the grain of station specialization would reduce market incentives for the production of programming for specialized audiences. They would also place the Commission in a position of having to involve itself with specific choices among preferred types of programming. We do not feel, for instance, that we should declare that children's programming in the 7:00–8:00 a.m. hour is inherently preferable to that time being used for news programs.[50]

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[49] Commercial broadcasting is guided by both regulatory and commercial requirements. The fundamentally commercial nature of the commercial broadcasting system, however, can only be ignored at great risk. It would be possible, as many have suggested, to correct advertising problems associated with the child audience through commercial time limitations or prohibitions, to correct scheduling problems through time of day requirements, to address age needs through program divisions, to respond to existing or regulation created failures of commercial incentives through program quotas, and to respond to general concerns over "quality" through cleverly crafted definitions or *ad hoc* reviews. The net result, however, would be a fundamental change in our broadcasting systems from one of licensee editorial discretion to one involving detailed agency oversight.

[50] The statutory and public interest basis for permitting, if not encouraging such segmentation and specialization, was recognized most recently by the District of Columbia Circuit Court of Appeals decision upholding the Commission's radio deregulation proceeding. *Office of Communication of the United Church of Christ v. FCC*, 707 F. 2d 1413 (D.C. Cir. 1983). The District of Columbia Circuit Court of Appeals opinion rejecting the Commission's policy statement in the "format" case

43. We thus find ourselves precisely caught between the apparent possibility of accomplishing an extremely important and socially desirable objective and the legislative and Constitutional mandate and the values on which they are based which forbid our direct involvement in program censorship and which require that broadcast station licensees retain broad discretion in the programming they broadcast. Recognizing that a balance must be reached, we believe this balance is best struck through a continued stress on the general licensee obligations emphasized by the Commission in its 1974 Children's Television Policy Statement and through the general requirement that stations provide programming responsive to the needs and interests of the communities they serve.[51] We continue to believe "that the broadcasters' public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience."[52] The record reflects that the child audience is a unique one that warrants special programming attention from licensees.

44. We do not believe it desirable, however, to mandate programming quotas or impose more specific program or scheduling requirements nor do we interpret the Policy Statement as imposing such obligations. In 1975, we stated that because "the considerations as to what constitutes a 'reasonable amount' may vary, according to service area demographics, existing children's programming, market size, network affiliation or independent status, prior commitments to locally-produced programs, and the availability of television, etc. we believe it is desirable to avoid rules which are unnecessarily broad and inflexible."[53] We continue to believe that this is true. It mirrors precisely the rationale set forth in the *En Banc Programming Inquiry* in 1960 as to why program quotas in other areas were not being adopted.[54]

45. We are acutely aware of the difficulties inherent in enforcing an unquantified general obligation to the child audience such as that described in the *Policy Statement* and of the charge made in the Task

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had previously recognized in that context that "[n]o public interest issue is raised if . . . there is an adequate substitute in the service area for the format being abondoned. . .." *WNCN Listeners Guild v. FCC*, 610 F 2d 838, 851 (1979), *reversed on appeal FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1979).

[51] *En Banc Programming Inquiry*, 44 FCC 2303 (1960).

[52] *Report and Policy Statement in Docket 19142*, 50 FCC 2d 1 (1974); See also, *Washington Association for Television and Children*, 712 F.2d 677 (D.C. Cir. 1983).

[53] *Memorandum Opinion and Order*, 55 FCC 2d 691, 693 (1975). cont.

[54] "It is emphasized that these standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast service in the public service. Rather, they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests." 44 FCC 2303, 2313 (1960).

Force Report and by others that such a policy is "unenforceable by either the Commission or the public."[55] Enforcement difficulties are created by a host of factors: (1) by the desirability of judging licensees on their overall programming record and not on one segment of that record alone; (2) by the desirability of taking into account the availability of programming from other sources; (3) by the need to account for the individual financial positions of newer and smaller market stations; (4) by issues associated with programming quality as opposed to quantity; (5) and by the constraints imposed by the First Amendment and Section 326 of the Communications Act. To the extent those who argue that the obligations imposed are unenforceable are simply stating that the Commission has a heavy burden to meet before it substitutes its judgment for that of a licensee, we believe that is as it should be. That has been the requirement since prior to 1934. Broadcasters, however, should not be misled into believing that no enforceable obligations remain. The bedrock obligation of every broadcaster to be responsive to the needs and interests of its community, including the specialized needs of children in that community, remains. Until such time as the Commission's role in station programming has been totally eliminated, those obligations will have to be enforced by the Commission and the Commission's performance in that regard will be subject to review by the Court of Appeals. This result is, we believe, entirely consistent with what the Supreme Court has described as "the Commission's duty to chart a workable 'middle course' to preserve 'essentially private broadcast journalism' held only broadly accountable to 'public interest standards.'"[56]

46. In summary, we do not wish this decision to be an endorsement of a "raised eyebrow" approach to regulation. No cryptic message will be found between the lines of this decision. Simply put, we find no basis in the record to apply a national mandatory quota for children's programming. But, there is a continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs. This duty is part of the public interest requirement that a licensee consider the needs of all significant elements of its community. A licensee may consider what other children's program service is available in its market in executing its response to those needs. But a licensee who fails to consider those needs, in light of its particular market situation, will find no refuge in this order.

47. *Regulatory Flexibility Analysis*:

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[55] Task Force Report, p. 92.

[56] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, note 32, quoting from *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 120 (1973).

I. *Need for and Purposes of the Rule*

The Commission has decided not to adopt new requirements regarding programming for children. Given the totality of video programming sources and their offerings for children, constitutional concerns regarding interference with the exercise of a licensee's programming discretion, and regulatory anomalies that often result from inflexible standards, the Commission concluded that specific quantification rules are undesirable.

II. *Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues raised:*

Commercial broadcasters, while recognizing their obligation to program for children, argued that establishing quantitative guidelines for children's programs would be arbitrary.

A few broadcasters recommended a clarification of licensee obligations under the *Policy Statement* or a gradual phase-out of the *Policy Statement* commensurate with marketplace developments.

Public interest organizations argued that self-regulation will not result in sufficient children's television and therefore suggested adopting rules requiring a minimum amount of children's programming and/or quantitative renewal processing guidelines for children's programming.

B. *Assessment*

The record reveals that a variety of existing communications services provide quantity and quality in children's programming. Furthermore, it appears that new services can be expected to provide new outlets in the future which will add to that diversity. In view of the present state of the marketplace, the Commission believes that specific quantification rules are undesirable.

The Commission also concluded that there was no value in substituting our judgment for that of the licensee in deciding what amount or type of programming for the child audience is needed. The licensee is in a better position to determine the interests and needs of the particular children in its audience.

C. *Changes made as a result of such comment:*

In response to those comments concerned about children's program offerings and our recognition of the important role of television in a child's life, we have continued to recognize the obligation of broadcasters to serve this portion of the audience. In response to opposition to the adoption of rules or renewal guidelines, we rejected the options proposing mandatory programming rules or renewal processing guidelines.

III. *Significant alternatives considered and rejected*

The *Notice* proposed rescinding or modifying the *Policy Statement*, adopting mandatory programming rules and children's programming license renewal processing guidelines, and increasing the number of video outlets.

The Commission concluded that the number of video outlets, both advertiser-supported and pay, currently available will provide diversity in children's programs without the necessity of adopting specific quantification rules or renewal guidelines. The Commission also reached this decision because of its constitutional concerns and recognition that regulatory anomalies often result from inflexible standards. Because of Commission actions recently taken that authorize new technological communications services, the Commission found no need to take any action to increase the number of video outlets.

48. Authority for adoption of the action taken herein is contained in Section 303 of the Communications Act of 1934, as amended.

49. IT IS FURTHER ORDERED, that the petition to amend FCC Form 303 filed January 24, 1979, by Altman Productions, Inc., IS DISMISSED.

50. IT IS FURTHER ORDERED, that the proceedings concerning this *Report and Order* ARE TERMINATED.

51. For further information concerning this proceeding, contact Freda Lippert Thyden, Mass Media Bureau, (202)632-7792 and Brian Fontes, Mass Media Bureau, (202)632-6302.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendices A, B, and C - may be seen in
FCC Dockets Branch,
Room 236,
1919 M Street, N.W.,
Washington, D.C. 20554.

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

In Re: Children's Television Programming Practices Report and Order in Docket No. 19142.

Requiem

I wish I had the eloquence of Mark Antony for this eulogy. Our federal children's television policy commitment deserves no less at this, its interment. Make no mistake – this is a funeral and my colleagues have here written the epitaph of the FCC's involvement in children's television.

To the casual observer, the course chosen by my colleagues—adopting a "modified" children's television programming policy—may appear a reasonable exercise of administrative discretion. For reasons detailed below this action was not only unreasonable, but an abrogation of this agency's responsibility to unique and vulnerable beneficiaries of the FCC's public interest charter.

I dissent to this *Report and Order* for three basic reasons. First, it changes the FCC's preexisting children's programming policy without fully explaining why those changes are in the public interest, in violation of elementary principles of administrative law.[1] Second, the majority's finding that there is sufficient programming to meet children's needs is arbitrary, because it is based on little more than conclusory assertions about the current conditions of the children's programming marketplace. In fact, record evidence strongly suggests that children's programs of the nature specified in the *Children's Television Policy Statement*[2] *are in short supply in many markets when children are likely to be watching.*[3] *Third, the legal and policy concerns advanced in opposition to a children's programming guideline are without foundation.*[4]

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[1] *See* Section A, *infra*.

Because the carriage of programming designed specifically to enhance the education of children by commercial television licensees is strongly in the public interest,[5] and because the record demonstrates this interest is not now being adequately met, the Commission should have adopted a flexible processing guideline to encourage the broadcast of such programming throughout the week, when most children's television viewing occurs.[6] The majority's failure to take appropriate remedial action reflects a serious error in judgment, if not also an abuse of discretion.

A. *Legal Inadequacies*

Administrative agencies have broad discretion in informal rulemaking proceedings and the scope of judicial review is relatively narrow. The courts simply require the agency's decision to be rational, supported by the record, based on a consideration of the relevant factors, and not arbitrary, capricious or an abuse of discretion.[7] However, when an agency changes its policy, it must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."[8] In these circumstances, the courts will closely scrutinize the analytical and factual bases for the choices made, and the agency "must provide sufficient analysis and explanation of the grounds for its decision."[9]

Judged against these standards, this *Report and Order* falls short in at least three particulars. First, the majority's finding that the video system as a whole—commercial broadcasters, public broadcasters and cable operators—is adequately serving the unique needs of children is arbitrary and unsupported by the record. With regard to the availability of children's television in the system as a whole, my analysis is outlined *infra* Section B.

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[2] *Children's Television Report and Policy Statement*, 50 FCC 2d 1 (1974) (*Policy Statement*).

[3] *See Section B, infra.*

[4] *See Section C, infra.*

[5] *See Policy Statement*, 50 FCC 2d at 5–7.

[6] My concept of a guideline is further discussed *infra*, Section C.

[7] *Telocater Network of America* v. *FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982).

[8] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[9] *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

Second, the majority has changed important parts of its children's television policy without providing a reasoned justification. Assuming *arguendo* it was entitled to take the action it took on this record, the majority is still legally obligated to state that the *Policy Statement* is being changed, and to supply a reasoned analysis of how and why it is being changed.

The 1974 *Policy Statement* specified, *inter alia*, that the Commission expected: children's programs to be scheduled throughout the week, not just on weekends; the development and airing of more educational and instructional programs; and the presentation of programs directed at specific age groups of children, including preschoolers.[10] The *Report and Order* apparently eliminates these requirements, with little or no supporting analysis or justification.[11] For example, one can only speculate as to the majority's reasons for dropping the requirement that licensees air age-specific programming, despite the Commission's prior stated conviction that such programming is necessary to serve children adequately. Equally inscrutible is the majority's rationale for abandoning the scheduling guidelines outlined in the 1974 *Policy Statement*. With regard to the now-defunct duty to air programming specially designed for children, including informational and instructional programming, the majority's reasoning, while no model of clarity, is apparently that such obligations are superfluous because a child can benefit equally, if not more, from general audience programs. *See Report and Order* note 39 and accompanying text. Curiously, however, the majority recognizes that children remain a "unique" segment of the audience. *See Report and Order* para. 43. That being the case, it is illogical for the majority to have concluded that the unique needs of children can be fulfilled without at least some programming by each licensee geared to children's special cognitive abilities and experiences[12]—and the majority furnishes no rationale to justify its position. As a matter of fundamental fairness, the general public and FCC licensees have a right to know the unarticulated reasons for these policy shifts, as well as the right to know precisely what duty to children remains and how it can be satisfied.[13]

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[10] *See Policy Statement*, 50 FCC 2d at 5–7.

[11] The degree to which the *Report and Order* repudiates the *Policy Statement* is not clearly stated in the *Order*. However, its radical evisceration of the *Policy Statement* can be gleaned from the majority's position that children can benefit equally if not more from family-oriented or adult programming, and from the fact that if the majority had meant to continue these obligations, it would have reaffirmed the requirements articulated in the *Policy Statement*. Furthermore, bench colloquy preceeding the adoption of this *Report and Order* made plain that requirements respecting educational and age-specific programming as well as scheduling are being deliberately dropped.

[12] For a description of the literature discussing the cognitive levels of children of different age groups and the benefits derived by children who watch programming geared to their stages of development, *see generally Television Programming for Children: A Report of the Children's Television Task Force* (FCC 1979) (*Task Force Report*), Vol. 5, Wartella, at 11–37, 50; Vol. 1, at 19–21.

Turning to what is left of a broadcaster's duty to children, one is again confronted with riddles. The *Report and Order* recites that commercial television licensees have a duty to devote "special programming attention" to the child audience. *See* para 43. With all due respect, this recitation is nothing more than a fig leaf to clothe the nakedness of the new policy. The *Report and Order* does not flesh out what broadcasters must do to comply. The barreness of the vestigial children's obligation becomes quickly evident, however, when one reviews what a broadcaster need *not* do under the terms of the *Report and Order*. Licensees need not air programs designed to meet children's unique needs. Nor are they obliged to air programming geared to specific age groups, or children's programs that are informational or educational. Apparently, broadcasters will be found responsive to unique needs of children as long as they air programming that children watch, whatever that may be. In sum, while a broadcaster has a "special" duty to children, *see Report and Order* para. 43, nothing special is required to fulfill it![14] Moreover, broadcasters may take local marketplace conditions into account in determining how (or whether) to meet their "duty" to children, *see* para. 46, a freedom not now enjoyed by licensees for television audiences as a whole.[15] Thus my colleagues have, in effect, "deregulated" television—but only as far as children are concerned.

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[13] In addition, nowhere does the majority address a central issue throughout this proceeding—whether commercial broadcasters have complied with the 1974 *Policy Statement*. The Children's Television Task Force found, based on comprehensive research, that self-regulation had failed. *See Task Force Report* Vol. 1. Given these results and the FCC's longstanding concern with the performance of commercial licensees in this area, the majority was obligated to confront the Task Force's findings squarely. Instead, it remains mute on that subject as well.

The majority's failure to retain the *Policy Statement* in its present form is not, in and of itself, disturbing because that document was ineffective at increasing or improving children's programming fare. What *is* extremely troubling (because of the record of overall commercial broadcaster performance developed in this proceeding), however, is the majority's failure to substitute policies calculated to ensure that the children of this country have an ample supply of programming designed for them on a regular basis.

[14] My colleagues note that "any 'quality' program—especially if it had some entertainment value and were capable of attracting a significant child audience" would meet the children's programming objective, *see* para. 35, but the FCC has never evaluated, and is not now proposing to evaluate, the quality of a licensee's programming.

[15] *See generally Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, FCC 83-313, rel. Aug. 4, 1983, 48 Fed. Reg. 37239 (Aug. 17, 1983) (Notice of Proposed Rulemaking).

The final arbitrariness of the *Report and Order* is that it imposes a special children's programming obligation on commercial television licensees at all. If, as the majority maintains, the system as a whole is meeting the needs of children, *Report and Order* para. 32, there is no basis for imposing a special children's programming duty, however diluted, on any part of the system. On the other hand, if there is a need to retain such a duty for part of the system, it must be for commercial broadcasters, since neither public broadcasters or cable operators had a special duty to children under the *Policy Statement*, or otherwise. But since commercial licensee self regulation under the *Policy Statement* was found by the FCC's Children's Television Task Force to be ineffective,[16] it makes no sense to sanction self regulation of an even weaker children's programming duty, especially since the majority recognizes that economic incentives continue to work against the airing of children's programs by commercial television licensees.

The majority cannot sustain its inconsistent approach: either children's needs are being fulfilled by commercial broadcasters voluntarily, in which case it was unnecessary to retain any special duty to children, or they are not, in which case remedial action was required.[17] The *Report and Order* irrationally chooses neither path.

B. *Availability of Children's Television Programming*

1. *Findings of the Task Force*

This agency has found that the public interest is strongly furthered when programming designed to meet children's unique needs (especially educational and informational programming) is widely available for both preschoolers and school age children.[18] The most comprehensive study of children's programming on commercial television in this proceeding found that commercial licensees are not advancing these objectives under a system of self regulation.[19] That study indicated that children's programming on commercial television stations has not appreciably increased since the *Policy Statement* was promulgated; that the amount of educational and age-specific programming on commercial stations has remained static; and that while most children's television viewing occurs during the week, nearly half of the children's programming on commercial stations is aired on the weekends.[20] The Task Force found that market failure in the commercial television industry is essentially responsible for the condition.[21] The Task Force concluded that the child audience has limited influence in an advertiser-supported medium and that, absent regulation or a fundamental structural change in television, the needs of children will remain largely unsatisfied.[22]

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[16] *See infra* notes 19–22 and accompanying text.

[17] The only conceivable explanation for the action taken is that progress is being made but since the system is not working perfectly, continued monitoring is necessary. However, the majority has not proferred this rationale for retaining a duty and, in any event, it has failed to make the case that widespread progress has occurred. *See infra* Section B.

[18] *See Policy Statement*, 50 FCC 2d at 5–7.

[19] That study was performed by the FCC's Children's Television Task Force. *See generally Task Force Report, supra.* The most current data available to the Task Force involved the 1977–78 season. More recent studies have been conducted by industry representatives and others, including the House of Representatives Subcommittee on Telecommunications, Consumer Protection and Finance. Because these studies vary in methodology and focus, it is extremely difficult to construct a reliable and detailed picture of what is presently available for children on commercial television. However, although these studies portray only a crude picture of industry performance since 1978, they do suggest: (1) a decline in the amount of children's programming on the average commercial station (*see*

2. *Majority's Findings*

The *Report and Order* adopts the Task Force's conclusion that the commercial incentives of the advertiser-supported television system are not conducive to meeting children's special programming needs (*see* para. 25). Nonetheless, the *Report and Order* finds "no national failure of access to children's programming," but instead, "ample evidence of the system as a whole moving to respond to the unmet needs of this audience." *See* para 32.

The conclusion that children on the whole are receiving adequate television service does not hold up under close scrutiny. To attest to the abundance of children's programming available to the children of this country, the majority points in general terms to increases on an overall national basis in the amount of children's programming carried by the average commercial station, to the dramatic growth in the number of commercial television outlets and to the existence of alternative programming sources like noncommercial and cable

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note 28 *infra*); (2) a decline in the number of commercial stations airing regularly scheduled weekday children's programs (*see* note 29 *infra*: F. Earle Barcus, *Weekday, Daytime Commercial Television Programming for Children* (Action for Children's Television 1981); a 1982 study by CBS submitted during the 1983 House of Representatives Hearing on Children and Television, (*see* note 35 *infra* at 157–160), does not provide meaningful information to the contrary because it includes programming aired on public television); and (3) a decline in the amount of educational programming on the average commercial station (*see* Oct. 5, 1983 study by U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection, and Finance, "Summary of Children's Programming on Commercial Television," submitted for record of Joint Hearing on the Potential of Television in Educating Children, which indicated that the average commercial television station devotes 61.38 minutes (or 0.77%) of its air time to children's educational and informational programming per week).

[20] *See Children's Television Programming and Advertising Practices* 75 FCC 2d 138, 142–44 (1979) (*Notice of Proposed Rulemaking*).

[21] *See id.* at 144–45; *Task Force Report* Vol. 1, at 29–35, 41–44, 76.

[22] *See Task Force Report* Vol. 1 at 29–35, 41–44, 76.

television—and criticizes the Task Force for having ignored these factors.[23] Far from amounting to "ample evidence" that the system is working, these factors simply underscore the continuing weakness of the system in meeting the needs of children.

(a). *Commercial television*. As an initial matter, it is inconceivable that the majority relies heavily on the commercial television system to furnish children's programming when both it and the Commission's own Task Force have found that commercial incentives run counter to commercial broadcasters meeting that objective.

Moreover, the mere fact that the number of commercial signals available to the average viewer has grown does not indicate that there has been a commensurate increase in access to children's programming.[24] There is no inexorable correlation between an increase in the number of signals and the existence of such programs.[25] And since the FCC has not bothered to monitor the commercial television industry's performance since the 1979 Task Force Report was prepared, the majority can cite no evidence (per station or per market) to bolster its claim that the amount of children's programming available on commercial television has increased in the interim.[26] Indeed, the most current industry study submitted for the record indicates, in stark contrast, that the number of hours a week of children's programs carried by commercial stations licensed to the average television market was almost the same in the 1981–82 season as it was before the 1974 *Policy Statement* was issued, although the number of stations has increased in the interim.[27] The study further suggests that the average number of hours a week aired in 1981–82 per commercial station is lower than the average aired in 1977–78.[28] As for regularly scheduled programming on commercial stations, there are studies in the record that suggest reverses exist in that area as well.[29]

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[23] The *Report and Order* also faults the Task Force for excluding family-oriented programming in its assessment of the children's programming marketplace. For a discussion of why this exclusion was proper, *see infra* note 61.

[24] Indeed, 22 percent of all television households still do not have access to independent commercial television stations, *see Report and Order*, para. 42, which assertedly provide substantial children's programming during the week when network affiliates do not. *Id.* at note 28.

[25] The criticism that the Task Force failed to account for the growth of commercial television in assessing the availability of children's programming is without merit. During the time frame studied, 1974–1978, the number of commercial television stations increased just 3 percent. (According to official statistics, the number of on-air commercial stations increased from 706 in 1974 to 728 in 1978. *See 47th Annual Report/1981 Fiscal Year/Federal Communications Commission* p. 96.). Adjusting the average number of hours broadcast in 1977–78 to reflect this increase in the number of stations could not materially have altered the Task Force's conclusions with regard to broadcasters' compliance with the *Policy Statement*.

[26] *See Report and Order* para. 32.

[27] *See NBC Further Analysis Of Children's Programming Available In 52 Markets Studied By The FCC Children's Task Force*, Table 2, filed November 1, 1983.

[28] *See id.* Tables 2 and 3. According to these data, 3.2 commercial television stations

Apparently recognizing that it is hazardous to rely exclusively upon contribution of the commercial television system, the majority places great stock in the existence of alternative children's programming sources, especially noncommercial and cable television.[30] But my colleagues are on thin ice here as well. As this Commission has previously recognized, "[t]hese alternatives offer a potential solution only in the long run"[31] because they are not now universally available—unlike commercial television. To this day, only the over-the-air commercial television system has the capacity to provide multiple channels of programming to virtually all the people of this country. For the foreseeable future, commercial television will continue to have unparalleled access and resources to reach young viewers. Therefore, sub-par performance by these licensees with respect to the child audience cannot be overlooked on the grounds that alternative outlets will make up the difference.[32]

(b). *Cable Television.* Granting that the Commission should not blind itself to the growth of alternative services in crafting its regulatory policies, the fact remains that a majority of the homes in this country—fully 60 percent—do not have cable television.[33] Of the forty percent who do subscribe to cable television, an unknown but

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were licensed to the average market in 1977–78, providing a total of 36 hours a week of children's programming (for a weekly per-station average of 11.2 hours). In 1981–82, according to this study, 3.5 commercial stations were licensed to the average market, providing a total of 35 hours a week of programming (or 10 hours per station).

[29] *See* Testimony of John Claster, President, Romper Room Enterprises, Oct. 16, 1980 and Apr. 28 1983. Claster's 1980 survey of commercial stations in the top 50 markets indicated roughly half of all stations carried regularly scheduled educational programs. According to Claster, in 1983, only 35% of the stations in the top 20 markets carried such programming.

[30] Here again, the majority is critical of the Task Force for limiting its purview to over-the-air commercial television. This criticism is unjustified given that the primary mission of the Task Force was to assess the commercial television industry's compliance with the *Policy Statement* and to determine whether additional actions were necessary to assure compliance by *these licensees* with previously established duties. (In reopening the record in 1978, the FCC's stated objective was to determine "whether self-regulation has been effective, whether our present children's programming and advertising policies are sufficient, and whether additional actions by the Commission are necessary to ensure licensee compliance with our guidelines." *Second Notice of Inquiry,* 68 FCC 2d 1344, 1352 (1978).)

[31] *Notice of Proposed Rulemaking, supra,* 75 FCC 2d at 147.

[32] Even the majority acknowledges that the FCC has previously rejected the view that the existence of noncommercial stations should be allowed to excuse commercial licensees' community obligations. *See Report and Order* note 31; *Sixth Report and Order,* 41 FCC 148, 163–64 (1952).

[33] Arbitron puts July 1983 penetration at 35 percent nationally. *Communications Daily,* Aug. 3, 1983 at 4. A.C. Nielsen estimates July 1983 penetration at 39.3 percent nationally. *Broadcasting,* Sept. 5, 1983 at 90.

lesser percentage have access to children's programming services cited by the majority, and the *Report and Order* is conspicuously silent as to what that percentage is.[34]

(c). *Public Television*. Public television has shown us the excellence possible in children's television. However, it is inappropriate for public television to be regarded as the "children's programming channel" as some have suggested. First, public broadcasting is subject to severe financial constraints and has suffered funding difficulties. As a result, it is producing fewer new programs or new episodes of existing shows.[35] Second, it not fair to expect public television to be the super-programmer for our youth. Public television has other viewer constituencies to serve. Third, like adults, children are entitled to a viewing choice. Consigning them to a single channel deprives them of the diversity of ideas and information that is central to federal broadcasting policy. And fully 10 percent of all television households do not have access to the public broadcast system.[36] Finally, by relying on non-commercial broadcasters to carry a substantial part of the children's programming responsibilities of the television system, the majority implicitly relegates these broadcasters to second-class citizens who are not entitled to the significant legal and policy sensitivity accorded by the majority to their commercial broadcaster bretheren.[37]

3. *Conclusion*

In sum, the majority errs in concluding that no regulatory response is called for on this record. The FCC previously affirmed its "unmistakable" intent to monitor commercial television licensees' compliance with the *Policy Statement*, and "to take further action, including the adoption of specific rules, to deal with any problems that the industry's self-regulatory effort does not meet."[38] This *Report and Order*, while sidestepping the issue of whether self-regulation by commercial licensees has been effective, concludes that no remedial action is required, and, in fact, that further relaxation of FCC policy is in order. I emphatically disagree with this conclusion. Based on the evidence submitted in this proceeding, it cannot be said that the commercial television industry as a whole is adequately serving the unique needs of children previously identified by the Commission in the 1974 *Policy Statement*,[39] or that the performance of commercial broadcasters will improve absent more stringent regulation, because of the recognized economic incentives inherent in the system. Nor, for the reasons outlined above, can it persuasively be argued that public and cable television suffice to bridge commercial television's shortfall. In short, the *Report and Order's* conclusion that there is "ample evidence of the system as a whole moving to respond" to the needs of children appears premised on little more than the rosy optimism of reluctant regulators.

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[34] When questioned at the Commission meeting about what percentage of cable subscribers have access to the new children's programming services, the staff and majority were unable to do more than *speculate* that two-thirds of cable subscribers (or about 27 percent of all television households) have such programming available to them. Even ignoring the public policy implications of requiring children to pay for access to programming, this ignorance is a sad commentary on the basis for the majority's conclusion that cable television is helping to meet the needs of children.

[35] "Children and Television," Hearing before the Subcommittee on Telecommunications, Consumer Protection, and Finance, Committee on Energy and Commerce, House of Representatives, 98th Cong., 1st Sess., Mar. 16, 1983, Testimony of Bruce Christensen, President, National Ass'n of Public Television Stations at 38, 44 (U.S. Government Printing Office, Serial No. 98–3).

[36] *See Report and Order* para. 29 and note 31.

[37] *See Report and Order* at para. 33 et. seq.

[38] *Second Notice of Inquiry*, 68 FCC 2d 1344, 1347 (1978).

C. *The Appropriateness of a Children's Programming Guideline*

The majority has failed to demonstrate that either the video distribution system "as a whole" or the commercial television industry by itself is meeting the television viewing needs of children previously identified by the FCC. It was therefore incumbent upon the majority to decide what additional steps should be taken to remedy this condition. In my judgment, a processing guideline applicable to all commercial licensees would have been a rational administrative response.

1. *Mechanics of the Guideline*

Based on the record developed in this proceeding, the Commission should have adopted a flexible children's programming processing guideline designed to increase the supply of programs that enhance the education of children[40] and retained it until it is shown that this need can be satisfied without government intervention.[41] No one has persuasively argued in this proceeding that there is an ample amount of educational programming geared to the unique needs of children.[42] Yet, as the Task Force and others have found, such programming is extremely beneficial to them.[43]

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[39] Even the majority does not make any such overarching contention. Indeed, it cannot, because it has made no factual findings about the current availability, nature and source of children's programming, either nationwide or within individual markets. *Compare Deregulation of Radio (Notice of Proposed Rulemaking)*, 73 FCC 2d 457, 484–490 (1979) (describing fundamental structural changes in radio which have led to improved service to narrow audiences in particular markets, contrasting that condition with more limited growth of television whose economics encourage licensees to provide broad, common denominator programming). The majority does not find a fundamental nationwide transformation of the television marketplace has occurred since 1979 which would lead to improved service to narrow audiences such as children. *See also* discussion re Specialization *Infra*. Section C. 3(c) p. 24.

[40] *See generally* H.R. 4097 "Children's Television Education Act of 1983," 98th Cong., 1st Sess., 129 Cong. Rec. E4793–94 (daily ed. Oct. 5, 1983) (requiring every television broadcast station to air each Monday through Friday for a minimum of one hour a day programming specifically designed to enhance the education of children). While I fully endorse H.R. 4097's approach in principle, as indicated above, I prefer a processing guideline to a fixed rule because of the flexibility a

Such a guideline would not present insurmountable legal or practical problems,[44] and would be consistent with the FCC's previous view that "the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the 'public interest'."[45] Like existing guidelines for nonentertainment, public affairs and local programming, a children's educational programming guideline would simply express an initial benchmark of acceptable performance. The staff could be given delegated authority to determine whether commercial television licensees filing the long form renewal application conformed to the guideline.[46] If a licensee proposed programming for the next

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guideline affords the FCC to deal with particular facts and circumstances.

Specifying the number of hours in a guideline is no easy task and might be best left to an FCC advisory committee which could present recommendations to the Commission *en banc* for final consideration. However, I would initially be inclined to favor a guideline that required each station to air a minimum of five hours of educational programming designed specifically for children during the week (Monday through Friday) at times when children are likely to be watching (*i.e.*, 7 a.m. to 8 p.m.) Obviously, any number chosen is perforce arbitrary, but this amount seems neither unreasonable nor burdensome. One network previously satisfied it voluntarily, and it is likely that the other networks would be able to do so as well. In addition, many of the independent stations already program substantial amounts of programming for children, albeit not all of it educational in nature.

[41] The FCC could commit to revisit the matter after a fixed period of time, as it did when it promulgated the *Policy Statement*, so that its regulatory intervention were no broader than necessary.

[42] Indeed, the Task Force found evidence of a substantial unmet demand for educational programs. *See Notice of Proposed Rulemaking, supra*, 75 FCC 2d at 145–46.

[43] *See* note 68 *infra*.

[44] The majority's legal and policy analysis centers on the legality and feasibility of mandatory programming rules and does not separately consider program processing guidelines (an alternative outlined in the Notice of Proposed Rulemaking). Although certain issues are unquestionably common to guidelines and rules – *e.g.*, program definitions, the appropriateness of age-specific requirements – processing guidelines are far easier to justify on legal and policy grounds because of their inherent flexibility and capacity for case-by-case consideration. In its apparent zeal to withdraw from the children's programming arena, the majority has focussed its attention on programming rules and has unwisely overlooked a less intrusive regulatory option.

[45] *Policy Statement*, 50 FCC 2d at 5.

[46] To educate the FCC and the general public about all licensees' performance under the processing guideline, every licensee could be required annually to place in its public file relevant information about children's programming carried during a designated composite week.

license term that fell below the Commission's guideline without a satisfactory explanation, its application could be sent to the Commission for a determination of whether the renewal application should be granted. Similarly, if the licensee's programming during the prior term[47] fell below the processing guideline without a reasonable explanation, the Commission *en banc* could consider the renewal application.

2. *Legality of a Guideline*

The consistency of such a guideline with the Communications Act and the First Amendment has never been squarely ruled upon, but it seems clear that a children's programming guideline would pass legal muster. It is hornbook law that the Commission's authority to promulgate rules, guidelines and policies is extremely broad,[48] and that this expansive regulatory charter empowers the FCC to promulgate content-related requirements.[49] Whether to adopt quantitative guidelines is a policy judgment within the FCC's discretion.[50] The Commission's authority to adopt general guidelines governing children's television programming has previously been upheld,[51] as has its power to single out such programming as a preferred category.[52] In short, nothing in the Communications Act expressly prevents the Commission from promulgating a guideline for children's programming so long as it rationally furthers the public interest.[53]

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[47] As the FCC did when it promulgated the *Policy Statement*, it could wait a reasonable period of time before reviewing a licensee's performance under the educational processing guideline.

[48] *See* 47 U.S.C. §§ 154(i), 303(r); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219–20 (1943).

[49] *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 395 (1967) (*Red Lion*).

[50] *National Black Media Coalition* v. *FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978). The legislative history of the Radio Act of 1927 rejecting a detailed scheme of fixed program quotas, cited by the majority, can hardly be deemed persuasive authority for the proposition that a children's programming processing guideline would exceed our statutory authority. Congress granted the FCC a broad public interest mandate—which the Supreme Court has characterized as "not niggardly but expansive"—to respond to continuing changes in this dynamic industry. *See National Broadcasting Co.* v. *United States*, 319 U.S. 190, 220 (1943). The FCC's expansive public interest mandate is sufficiently broad to support a processing guideline promulgated to advance a compelling public need. Indeed, while the Commission's historical bias against program guidelines (discussed by the *Report and Order*) is well known, we recently observed that "this is not to say that we may not impose such standards or that they would be unlawful or unwise in every case. . . ." *Deregulation of Radio, (Memorandum Opinion and Order)* 84 FCC 2d 968, 1055 (1981).

[51] *Action for Children's Television* v. *FCC*, 564 F.2d 458, 479–80 (D.C. Cir. 1977) (*ACT*).

[52] *National Ass'n of Independent Television Producers and Distributors* v. *FCC*, 516 F.2d 526, 538 (2d Cir. 1975) (*NAITPD*).

[53] Furthermore, such a guideline would not impermissibly infringe upon broadcast-

A processing guideline designed to insure that commercial television licensees provide programming to enhance the education of children would rationally further the public interest. The Commission's prior emphasis on airing educational and informational programming designed for children was premised on the view that the proper functioning of a free society depends on an educated citizenry, and that television, by airing educational programs, can do

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ers' First Amendment rights. A children's programming processing guideline would constitute a minimal intrusion into a broadcaster's discretion. As with existing processing guidelines for news and public affairs, *see, e.g.*, 47 C.F.R. § 0.283(a)(7), no specific programs would be dictated, and broadcasters would be accorded wide discretion in satisfying the guideline. Judicial approval of the children's programming exemption to the prime time access rule demonstrates that the FCC can legitimately prefer certain categories of programming over others consistent with the First Amendment, *see NAITPD*, 516 F.2d at 536–38, and that the FCC's preexisting children's programming definition was not impermissibly vague, *id.* at 539–40.

The majority properly notes that broadcasters are entitled to substantial editorial discretion, but fails to acknowledge that this discretion may be tempered to protect the "paramount" rights of viewers and listeners to "suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." *See Red Lion*, 395 U.S. at 390; *accord CBS, Inc.* v. *FCC*, 453 U.S. 367, 395–96 (1981). *Red Lion* made clear that because broadcasting is a medium not open to all, licensees can be required to air certain categories of programming to further the public's interest in an uninhibited marketplace of ideas. *Red Lion*, 395 U.S. at 389–92. This Commission has previously embraced a broad construction of *Red Lion*, indicating that "the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues." *Policy Statement*, 50 FCC 2d at 5. (As a point of interest, it is worth noting that *Red Lion* is conspicuous by its absence in the *Report and Order*. The doctrine it espouses has apparently fallen out of favor with this Commission majority.)

The generalized public right of suitable access established in *Red Lion* supports the notion that children in particular have a right to receive programming suitable to their needs and that this right may be furthered by an affirmative duty to air children's programming as proposed above. This conclusion is buttressed by previous Supreme Court rulings recognizing that children are a unique group entitled to special legal protections. *See Prince* v. *Massachusetts*, 321 U.S. 158 (1943); *Ginsburg* v. *New York*, 390 U.S. 629 (1968); *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). If society's interest in protecting children is sufficient to validate an FCC ruling which effectively restricts a licensee's right to program certain adult-oriented material during substantial portions of the day, (*see Pacifica, supra*, 438 U.S. at 748–50), it should certainly be weighty enough to uphold a guideline designed to encourage the broadcast of programs beneficial to children. Because of their immaturity, children are innately incapable of expressing their programming needs and interests or influencing programming as purchasers of advertised goods and services. The guideline proposed above, which accords broadcasters wide discretion in program selection and scheduling, would protect the legitimate interests of this unique audience consistent with prior First Amendment case law. (The dictum in *NAITPD* cited by the majority to the effect that a mandatory programming requirement might raise serious First Amendment questions is not fatal to this conclusion since that issue was not before the court. Indeed, a later decision indicated that "the Commission may well have adequate authority to act in this area, and even perhaps to the extent [of promulgating mandatory rules]." *See ACT*, 564 F.2d at 480.)

much to prepare children to participate in the nation's democratic process.[54] A similar position was recently expressed by a National Science Board report, which recommended that television play a greater role in the educational process.[55] In 1974, when the Commission made its position plain, it expressed special concern about the amount of time devoted by licensees to educational children's programs, noting that none of the networks carried a single informational program on Saturday and that only one network carried an educational program during the week. Various industry representatives filing comments dispute the Task Force's contention that licensees have not complied with the *Policy Statement* in this regard, but none has persuasively documented that licensees are presently airing more than the amount of educational programming aired before the *Policy Statement*—or even the same amount.

Nevertheless, the majority jettisons even a general requirement that children's educational programming be aired. Its action (or inaction) on this score is due to perceived policy and legal difficulties that would result from *any* quantified duty to air programs designed especially for children.[56] To be sure, any content-related requirement ought to raise our sensitivities. But the objections conjured up by the *Report and Order* are overblown.

3. *The Majority's Policy Objections*

The principal policy objections advanced by the majority are that: (a) the real concern with regard to children's television is over program quality, which a quantitative guideline is ill-suited to remedy; (b) it is virtually impossible to frame an appropriate programming definition; (c) a quantitative guideline would impede programming specialization.

(a). *Quality versus Quantity.* As for the first point, contrary to the majority's assertion, the real issue presented is whether the FCC should require broadcasters to be responsive to the unique needs of children. By transforming the debate into one centering on the quality of children's programs, the majority attempts to sidestep the issue. The FCC has never served as the arbiter of program quality. But that has not prevented it from specifying categories of public interest programming that must be aired by broadcasters (*e.g*, news, public affairs) while leaving the selection of particular programs to the good faith discretion of licensees. This approach has permitted the FCC to observe the "delicate balance" between preserving a licensee's journalistic discretion and protecting the public interest.[57]

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[54] *Policy Statement*, 50 FCC 2d at 5–6. More recently, the Commission indicated that issue responsive programming is the single programming species that best promotes the paramount goal of fostering an informed citizenry. *See Deregulation of Radio*, 84 FCC 2d 968, 977, 982 (1981). Requiring a broadcaster to provide programming that enhances the education of children is consistent with, if not compelled by, the foregoing goal.

[55] *See* National Science Board, *Educating Americans for the 21st Century* (National Science Foundation 1983).

[56] As demonstrated *supra*, pp. 17–20, the legal obstacles posed by a guideline are not insurmountable.

My proposal for children's educational programming guideline would continue this approach. Clearly, a quantitative guideline does not guarantee that only qualitatively superior children's programs will be broadcast; however, an educational programming guideline, at a minimum, is likely to increase children's access to programs found beneficial to them.[58] Therefore, the fact that it does not assure a "perfect outcome" should not prevent its adoption.[59]

(b). *Definitional Problems*. It is also argued that a guideline keyed to programs designed for children is inappropriate because the purpose to be served—"can be accomplished with adult or family programming as well or better than with specifically child programming". . . .[60] According to the majority, this conclusion is buttressed by the fact that children watch these shows more often than children's programs. There are two responses to this argument. First, just because children may, on occasion, incidentally benefit from adult programming does not diminish the record evidence in this proceeding that they have immature viewing capabilities; therefore, they are entitled to programs geared to their needs.[61]

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[57] *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 117 (1973).

[58] The contention that a guideline would encourage broadcasters to favor cheap "filler" programs at the expense of costlier but qualitatively superior programs is theoretically possible but not necessarily true. An equally plausible theory is that if all broadcasters were held specifically accountable for providing some programming to enhance the educational needs of children, each would have an incentive to provide the most attractive programming to garner the largest audience share.

[59] The majority maintains that rigid scheduling and programming requirements would be illogical, citing dictum in *Washington Ass'n for Television and Children* v. *FCC*, 712 F.2d 677, 684 (D.C. Cir. 1983) (*WATCH*). However, its characterization of *WATCH* is inaccurate and, thus, reliance on it misplaced. *WATCH* observed that a requirement that could be satisfied by a regularly scheduled half-hour cartoon each week but not by three hours of educational specials would "not make sense from a policy standpoint." I agree. The guideline proposed here, however, would not suffer that infirmity because it would require an aggregate amount of weekly educational programming but leave licensees broad scheduling discretion. Under my proposal, the fact that the children's programming aired by a licensee consisted of weekly "specials" would not automatically foreclose it from satisfying the guideline.

[60] *See Report and Order* note 39 and accompanying text.

[61] The *Policy Statement*, in recognizing the uniqueness of children's viewing needs, stated: "[B]ecause of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience." *Policy Statement*, 50 FCC 2d at 5. The FCC reaffirmed the view that a child has unique

Second, children watch adult programs more often than children's programs because most child viewing occurs during the week when fewer children's programs are aired. There is simply nothing else for them to watch. And even if children sometimes prefer adult programs to shows intended for them, that does not mean that they should not be given a choice. For many children, that choice is often lacking.

(c) *Specialization.* The argument that a guideline would discourage station specialization[62], contrary to the hopes of the Task Force, is similarly without foundation. A requirement that each station devote a modest amount of time to children's programs throughout the broadcast week would not alter a licensee's freedom to air more than the specified minimum in an attempt to attract a larger children's following. In any event, genuine children's programming specialization will not exist (outside the largest markets having numerous outlets) until the video and radio markets generally begin to resemble each other in terms of number of outlets. Only then would economic theory suggest that a guideline would discourage specialization for children. That day has not arrived. In 1979, the Task Force found that the number of television outlets in many markets was far too limited to create a climate in which specialized children's stations would emerge.[63] It therefore recommended a

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viewing needs when it later defined children's programming as "programs originally produced and broadcast primarily for a child audience twelve years old and under." *See Memorandum Opinion and Order,* 53 FCC 2d 161, 162 (1975).

The majority now approves a broader approach to children's programming, finding the Commission's previous focus unduly narrow because it excludes adult programs watched by and beneficial to many children and programs designed to promote family television viewing. However, this analysis ignores the substantial body of research confirming the unique characteristics of the child audience, the utility of programming especially designed for children of different ages, especially preschoolers, and the social benefits derived by children who watch programs designed for them. *See generally Task Force Report,* Vol. 5, Wartella, at 11–37, 50; *Task Force Report,* Vol. 1, at 19–21. Family-oriented programming is undoubtedly valuable, but not being designed with the special requirements of children in mind, cannot address their special developmental needs. *See Notice of Proposed Rulemaking,* 75 FCC 2d at 144, 144 note 24, 146. Requiring broadcasters to air programming designed for children does not reflect a judgment that family programming is undesirable; it merely recognizes that custom tailored children's programming (as previously defined) is essential if a child's unique viewing needs are to be met.

[62] Specialization, as the FCC has used the term, occurs when there are so many competing outlets in a market that economic incentives encourage stations to seek out and meet specialized audience needs. *See generally Deregulation of Radio,* 73 FCC 2d at 484, 489–90. In *Deregulation of Radio,* such specialization by radio stations was approved based on finding that the radio industry had undergone a fundamental structural change. *See Office of Communication of United Church of Christ* v. *FCC,* 707 F.2d 1413, 1420 (D.C. Cir. 1983).

[63] *See Task Force Report,* Vol. 1, at 32–40. The Task Force recognized that independent stations provide substantial amounts of children's programming, especially in large markets, but recommended retention of a quantitative

mandatory programming requirement, as an interim measure, which would be lifted when the number of television programming outlets had substantially increased.[64] The growth of television stations has been relatively modest since the *Task Force Report* was published[65] and the majority cites no empirical evidence showing that fundamental, nationwide structural change and corresponding specialization in children's programming, as envisioned by the Task Force, have taken place. Until such change and specialization occur, the existence of a processing guideline should have little, if any, effect on specialization in most markets.

D. *Conclusion*

Throughout its involvement with the issue of children's television, the FCC has recognized the tremendous potential television holds for the children of this country and has attempted to require commercial television broadcasters, as fiduciaries of a great public resource, to provide the benefits inherent in this medium to this unique audience segment. The majority's essential muteness on these points underscores an unprecedented indifference to children's rights to responsive programming on commercial television.

There are more than 30 million children in this country between the ages of two and twelve.[66] The average child watches many hours of television each week,[67] and probably spends more time in front of a television set than in the classroom. Thus, television has assumed a central, pervasive role in the lives of children.

Television has tremendous potential for enhancing a child's development.[68] Ten years ago in the *Children's Television Policy*

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guideline until the advent of a "significant structural change in the industry" prompted the development of stations that specialized in children's fare. *See id.* at 79. The majority cites to the division of programming responsibility between independents and network affiliates (adverted to by the Task Force in 1979) as evidence of the fact that specialization is occurring. However, in 1979 the Task Force found such "specialization" insufficient to meet the needs of most children, and the majority cites no evidence showing that even such limited specialization is more prevalent in 1983 than it was in 1979.

[64] See *Task Force Report*, Vol. 1, at 75–79.

[65] Between 1979 and 1982, the number of on-air television stations grew from 1008 to 1079, or roughly nine percent. *See Broadcasting/Cablecasting Yearbook* 1980, p. A-2 (Broadcasting Publications, Inc. 1980); *Broadcasting/Cablecasting Yearbook 1983*, p. A-2 (Broadcasting Publications, Inc. 1983).

[66] U.S. Department of Commerce, Bureau of the Census, *1980 General Population Statistics*.

[67] *1982 Nielsen Report on Television*, "Weekly Viewing Activity for Women, Men, Teens and Children," pp.8–9 (Nielsen Media Research 1982).

[68] Educational programming yields considerable learning benefits, especially for preschoolers, whose limited reading capacity restricts the range of educational resources available to them. *See Task Force Report* , Vol. 1 at 19–21. For example, research on the impact of *Sesame Street* indicates that preschoolers' cognitive skills improved markedly by watching the program. *See* Gerald S. Lesser, *Children and Television: Lessons from Sesame Street* (Random House 1974).

Statement, this Commission appreciated the rich potential of television for America's children when it instructed commercial broadcasters to increase the amount of educational and informational programming designed for children. More recently, in issuing the Notice of Proposed Rulemaking in this proceeding, the Commission continued to recognize that "television programming has an enormous potential for enriching the lives of children" which "is still largely unrealized."[69] Unfortunately, despite these findings and policies, the *Report and Order* adopted by this Commission majority scarcely acknowledges the potential commercial television holds for the youth of this country. At a time when the educational training and fitness of children are subject to increasing criticism,[70] this indifference is unfortunate, if not outrageous.[71]

In conclusion, the majority has dishonored our most treasured national asset—children. It has set the notion of enforceable children's programming obligations on a flaming pyre, adrift from federal concern, in the hope that the concept will be consumed in its entirety and never return to the FCC's shores. I dissent.

Children can also develop positive social attitudes, *see Task Force Report, supra*, Vol. 1 at 21, and can become motivated to learn about their environment by watching television. *See* Remarks of Honorable Timothy E. Wirth regarding "Children's Television Act of 1983," 129 Cong. Rec. E4793 (daily ed. Oct. 5, 1983). Television is an extremely cost-effective teaching tool. National Science Board, *Educating Americans for the 21st Century* 106 (National Science Board Commission on Precollege Education in Mathematics, Science and Technology 1983). Unfortunately, according to the most current information in the record, only a small fraction of the children's programming aired on commercial television is educational or instructional. *See Notice of Proposed Rulemaking*, 75 FCC 2d at 143 (1979); *Task Force Report supra*, Vol. 3, "The Amount of Children's Instructional Programs Aired During the 1973–74 and 1977–78 Television Seasons," at 6, 11–12.

[69] *Notice of Proposed Rulemaking, supra*, 75 FCC at 152.

[70] *See* National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (U.S. Government Printing Office 1983).

[71] The majority concludes with the exhortation that broadcasters who ignore their duty to children will find "no refuge in this Order." *See* para. 46. In reality, it is the children of this country interested in improved television programming for whom the *Report and Order* will provide no refuge.

Agreement, to Withdraw Application
Engineering Data
Financial Qualifications
Publication, in Drop-out Case
Remand

Review Board granted in part an appeal and remanded proceeding to ALJ for further consideration of settlement agreement in light of evidence to be adduced on relative reception needs of communities, 47 CFR 73.3525 (b) and 47 USC 307 (b), and certification of continued financial qualifications. Mutual exclusive allegation rejected because engineering showing failed to raise substantial and material question of fact.
–Wilson County B/c Services, Inc.
BC Docket 82–859

FCC 83R–102

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

WILSON COUNTY BROADCAST SERVICES, INC. WQDQ, LEBANON, Tennessee	MM Docket No. 82–859 File No. BP-810123AA
LINCOLN BROADCASTING COMPANY, INC. WLCB, Hodgenville, Kentucky	MM Docket No. 82–860 File No. BP-810518AH
Edward M. Johnson and Millard V. Oakley d/b/a LEBANON BROADCASTERS Lebanon, Tennessee	MM Docket No. 82–861 File No. BP-810526AC
William Walters d/b/a RADIO RADCLIFF Radcliff, Kentucky	MM Docket No. 82–862 File No. BP-810526AF
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: December 21, 1983; Released: December 27, 1983.)

BY THE REVIEW BOARD:

1. The above-captioned AM broadcast applications, although relating to three different communities, were originally electrically mutually exclusive with each other and, hence, were designated for comparative broadcast hearing by Hearing Designation Order, 48 Fed. Reg. 4732, published February 2, 1983. By Memorandum Opinion and Order, FCC 83M-2549, released August 2, 1983, presiding Administrative Law Judge Edward Luton (ALJ) took the following actions: (a) approved a settlement agreement between Radio Radcliff and Lincoln Broadcasting Company, Inc. (Lincoln) and dismissed the Lincoln application; (b) approved a settlement agreement between Wilson County Broadcast Services, Inc. (Wilson) and Lebanon Broadcasters (Lebanon) and dismissed the Lebanon application; (c) granted engineering amendments proffered by Wilson and Radio Radcliff to eliminate the mutual exclusivity between their respective applications; (d) granted a petition to intervene filed by Elizabethtown Broadcasting Co. (Elizabethtown) and Mid-Kentucky Radio Corp. (Mid-Kentucky) but denied their motion to enlarge issues filed March 4, 1983; and (e) granted the applications of Wilson for improved facilities for Station WQDO, Lebanon, Tennessee, and Radio Radcliff for a new AM broadcast station at Radcliff, Kentucky, and terminated the proceeding. Now before the Review Board are a joint appeal from that order, filed by the intervenors on September 1, 1983; oppositions by Wilson and Radio Radcliff and comments by the Chief, Mass Media Bureau; and the intervenors' replies.

2. In their appeal, the intervenors, who are licensees of existing AM and FM stations that will compete economically with the modified Wilson and new Radio Radcliff stations,[1] challenge the ALJ's approval of the Radio Radcliff-Lincoln settlement agreement without prior republication pursuant to Section 73.3525(b) of the Commission's Rules (47 CFR § 73.3525(b)); aver that the Wilson and Radio Radcliff applications are mutually exclusive and should therefore not have been granted without hearing; and claim that Radio Radcliff is not financially qualified. We affirm the ALJ's determination that the Wilson and Radio Radcliff applications, as amended, are no longer mutually exclusive but withhold approval of the Radio Radcliff-Lincoln settlement agreement and remand the proceeding to the ALJ for receipt of evidence on the relative reception needs of the communities of Radcliff and Hodgenville, Kentucky, and for a determination of the effect of Radio Radcliff's proposed second transmitter on its financial qualifications.[2]

3. *Settlement Agreement.* The Radio Radcliff-Lincoln settlement

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[1] Elizabethtown is the licensee of Station WIEL (AM), Elizabethtown, Kentucky, and Mid-Kentucky is the licensee of Station WKMO-FM, Hodgenville, Kentucky.

[2] Neither the ALJ's approval of the Wilson-Lebanon settlement agreement nor the resulting dismissal of Lebanon's application has been appealed. These actions stand. Section 1.302 of the Rules, 47 CFR § 1.302.

agreement calls for grant of the Radio Radcliff application for Radcliff, Kentucky and dismissal of the mutually exclusive Lincoln application, which is the only one in this proceeding to specify Hodgenville, Kentucky as its proposed community of license. The ALJ approved the agreement after finding that republication to provide other persons an opportunity to apply for the withdrawn Hodgenville facilities was unnecessary because dismissal of the Lincoln application would not unduly impede the objective of Section 307(b) of the Communications Act of 1934, as amended, which is "to provide a fair, efficient, and equitable distribution of radio service" among communities, 47 U.S.C. § 307(b). *See* Section 73.3525(b)(1) of the Rules, 47 CFR § 73.3525(b)(1).

4. Appellants contend that the ALJ erred in finding republication unnecessary because Hodgenville, which has only one radio station licensed to it, has a greater need for a "second transmission service" than Radcliff, which already has "two local transmission outlets." Appeal at 4–5. They also claim that the ALJ was "precluded from approving the Settlement Agreement without requiring publication" because Radio Radcliff and Lincoln failed "to submit any information on reception needs" of their respective proposed communities of license. *Id.* at 5.

5. As appellants readily concede, Radcliff has a significantly larger population than Hodgenville (14,519 to 2,459), Station WKMO-FM is licensed to Hodgenville, and Radcliff has no broadcast stations that are actually licensed to it. Appeal at 4 and n.4. Consequently, Radcliff, which is both the larger community and the only one lacking its own licensed station, would normally be considered as having the greater need for a new transmission service. *See Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 709-710, 51 RR 2d 389, 393–94 (Rev. Bd. 1982); *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 115, 46 RR 2d 1467, 1475 (Rev. Bd. 1980). However, appellants cite these same cases in support of their claim that Stations WSAC and WWKK-FM, licensed to Fort Knox, Kentucky, are "surrogate transmission outlets" for the adjacent community of Radcliff. Appeal at 4 and n.4. Specifically, they urge that both stations have studio and transmitter sites in Radcliff, provide city-grade signal coverage there, have 47% of their advertising accounts there, and, as a matter of station policy, devote 50% of their news programming and public service announcements to Radcliff and surrounding Hardin County (the remaining amount is addressed to Fort Knox). *Id.* at n.4; appellants' joint Motion to Enlarge Issues, filed March 4, 1983, at 8, and Attachment at 3–4 (official notice taken). Also, Station WSAC identifies itself as a Fort Knox-Radcliff station. *Id.*

6. Although appellants' allegations indicate that the Fort Knox stations are fully meeting their obligations to serve on a secondary basis other communities in the service area—including Radcliff and Hardin County—they are insufficient to show that those stations

provide the same degree of service to Radcliff as would stations licensed to that community. *See Cornwall Broadcasting Corp., supra*, at 713, 51 RR 2d at 396. And, although the question of which of the two communities at issue here - - Radcliff or Hodgenville - - would have greater need for a *first* transmission service would be a close one in view of the substantial service rendered Radcliff by the Fort Knox stations, we are not faced with that situation. Simply put, the smaller community of Hodgenville already has a true first transmission service, while the significantly larger community of Radcliff has none, and we see no compelling reason why Hodgenville should be granted a second transmission service while Radcliff continues to be served by two Fort Knox stations that render, at most, "surrogate" rather than true local transmission service. In view of the Commission's "very high priority on providing a first local outlet," *Mobile Broadcasting Service, Inc.*, 91 FCC 2d 1209, 1211, 52 RR 2d 670, 672 (1982), we agree with the ALJ that Radcliff has the more apparent need for a new transmission service than does Hodgenville. Nevertheless, before resolving the question of need for republication, we must first consider appellants' assertion that data on the proposals' reception aspects is needed.

7. In *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2605–2609, 22 RR 605, 610–613 (1961), the Commission expounded upon the factors that must be weighed in determining which of two competing AM applications would better serve the Section 307(b) mandate to provide a fair, efficient and equitable distribution of radio service. An AM station is required to "provide 2 types of service - - a reception service for its entire proposed service area and a transmission service (i.e., outlet for local expression) for its proposed community of station location." *Id.* at 2606, 22 RR at 610. Consequently, a proper Section 307(b) comparison involves a balancing of the proposals' reception aspects - - "the relative populations and extent of the areas proposed to be served and the number of reception services presently available to each of the proposed service areas and portions thereof" - - as well as "[t]he relative needs for a transmission service [which] are weighed primarily in the light of the number of . . . broadcast facilities in each of the communities and the populations of these communities." *Id.*; 22 RR at 611. However, in the instant case, while we have affirmed the ALJ's determination that the community of Radcliff has an apparently greater need for a new *transmission* service, no proffer of evidence was made by Radio Radcliff and Lincoln, the settling applicants, regarding the *reception* aspects of their proposals. Consequently, we cannot at this juncture make the requisite determination, pursuant to Section 73.3525(b)(1) of the Rules, that the withdrawal of Lincoln's application would not unduly impede the achievement of a fair, efficient and equitable distribution of radio service. *James L. Hutchens*, 4 FCC 2d 700, 8 RR 2d 397 (Rev. Bd. 1966); *see also Waynesville Broadcasting Co.*, 42 RR

2d 1197 (1978). Nevertheless, rather than immediately require republication at this stage of the proceeding (no hearing ever occurred because of the ALJ's approval of the settlement agreement), we shall remand the proceeding to the ALJ so that he can receive evidence concerning the reception needs of the proposals, including the presence or absence of unserved or underserved areas.

8. In opting to remand rather than to require immediate republication, we are influenced by the Commission's teaching in *Kent-Ravenna* that "the importance of the reception aspects of the proposed service may be considerably secondary to its transmission aspects where the use of local channels is contemplated." 44 FCC at 2606–2607; 22 RR at 611. The 1200 kHz frequency at issue here is a Class II channel recently made available by the Commission's Report and Order in *Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 47 RR 2d 1099, *recon. granted in part*, 83 FCC 2d 216, 48 RR 2d 1077 (1980), *aff'd sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir., 1982). Class II stations generally can provide either wide area or localized service. *Id.* at 1351–1352, 47 RR 2d at 1103. However, Lincoln's application, which is to be withdrawn pursuant to the settlement agreement, proposes to operate with power of only 1 kilowatt by day and 250 watts at night, the functional equivalent of a Class IV station which is designed to provide localized service, *id.* at 1352, 47 RR 2d at 1103. Since the application proposed to be withdrawn appears to be one for local rather than wide-area service, the transmission aspects - - by which we have already found Radio Radcliff's application to be *prima facie* superior - - may well be more important than the reception aspects in this case. See *Kent-Ravenna, supra*. Nevertheless, consistent with the case precedents cited in paragraph 7, *supra*, evidence on relative reception needs must be at hand before a meaningful Section 307(b) judgment may be made. Once the ALJ has received that evidence, he is directed to weigh it appropriately under the *Kent-Ravenna* standard and to determine in light thereof whether republication is necessary. Should he determine that it is not, this brief remand in lieu of automatic republication will yield a substantial savings of time in initiating new broadcast service. On the other hand, should republication be required, the remand delay will have proved to be an efficient, albeit not dispositive, intermediary step.

9. *Signal Contour Overlap*. The ALJ accepted engineering amendments filed March 30, 1983 by Wilson and Radio Radcliff, found that they eliminated the mutual exclusivity between their applications, and granted the applications. In so doing, he ruled that the engineering report submitted by the applicants to demonstrate the absence of prohibited signal contour overlap was significantly more reliable and accurate than the conflicting engineering analysis submitted by appellants. FCC 83M-2549, *supra*, paras. 7–10. Appellants now contend (Appeal at 7) that the ALJ erred in granting the

applications without a hearing because they allegedly had raised a substantial and material question of fact as to whether there would be prohibited signal contour overlap between the applicants' proposed stations in violation of Section 73.37(a),(b)(2) of the Rules, 47 CFR § 73.37(a),(b)(2). *See* 47 U.S.C. § 309(e). They also assert that the ALJ improperly relied on the Wilson-Radio Radcliff engineering showing because it failed to comply with the engineering measurement procedures set forth in Section 73.186 of the Rules, 47 CFR § 73.186. In opposition, Wilson and Radio Radcliff argue that their engineering data demonstrate there will be no prohibited overlap and that appellants' engineering analysis is seriously flawed and therefore is insufficient to raise an issue warranting hearing. The Mass Media Bureau agrees with the ALJ and appellees that there is no prohibited overlap and states that the applicants' engineering showing substantially complies with Section 73.186 of the Rules. We reject appellants' contentions and affirm the ALJ's ruling.

10. By their engineering amendments, Wilson and Radio Radcliff proposed to eliminate their previous prohibited signal contour overlap by utilizing separate daytime transmitter sites not far from their originally-proposed sites which now will be used for nighttime transmission only. Their engineering analysis, which shows that there will be no mutual exclusivity between their respective proposals, is based on current (1982) engineering measurements. From our review of their amendments and the pleadings before us, we are fully persuaded, as were the ALJ and the Bureau, that the applicants substantially complied with the provisions of Sections 73.153 and 73.186 of the Rules, 47 CFR §§ 73.153 and 73.186, governing the submission of their engineering data and made a strong *prima facie* showing that there no longer would be any prohibited signal contour overlap between the proposed stations. Appellants attempted to rebut this showing with an engineering analysis based *not* on current measurements, but on data compiled in 1958 using signal levels at 250 watts of power whereas the relevant present-day power figure is 500 watts. Appellants' analysis is far less comprehensive in terms of distances and radials considered than that of the applicants. In their November 10, 1983 reply before the Board, appellants feebly contend that they could not verify applicants' measurements because they could not identify the exact measurement points. Notably, they did *note* allege that they had requested more detailed information from the applicants. We find that the appellants' showing is insufficient to rebut the strong *prima facie* case made by the applicants or to establish that a substantial and material question of fact exists which requires a hearing. *Cf. Tele-Media Corporation* v. *FCC*, 697 F.2d 402, 409 (D.C. Cir. 1983); *Chuck Stone* v. *FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972); *Childress of Virginia*, 46 RR 2d 519 (1979); *Dennis F. Doelitzsch*, 44 RR 2d 1241 (1978). Although we normally prefer that parties submit

joint measurements in order to resolve engineering disputes, *see, e.g., GSM Media Corp.*, FCC 83R-64, released September 6, 1983, in this case the weak engineering showing presented by the appellants is insufficient to justify any further consideration of their contentions under this issue.

11. *Financial Issue*. Finally, the appellants claim that the ALJ erred in refusing to add a financial qualifications issue against Radio Radcliff. They point out that Radio Radcliff originally estimated its costs to be $231,536 for construction and initial operation from a single transmitter site and showed available funds of $234,250. However, when the settlement agreements in this proceeding were filed, Radio Radcliff did not show the availability of additional funds that might be needed to cover both the $4,825 that it has agreed to pay in consideration for the withdrawal of Lincoln's application and the extra costs that will likely accrue as a result of constructing and operating from separate daytime and nighttime transmitters.

12. Since the proceeding is being remanded on other grounds, we will afford Radio Radcliff an opportunity to certify to the ALJ that its engineering amendment specifying dual transmitter sites and its participation in the settlement agreement with Lincoln have not rendered it financially unqualified. *See Revision of Form 301*, 50 RR 2d 381, 382 (1981). Although the Commission recently ruled in *South Florida Broadcasting Co., Inc.*, 53 RR 2d 1683, 1685 (1983), that it would not allow applicants in hearing who had filed their applications on the 1977 version of FCC Form 301 to initially establish their financial qualifications by the new certification procedure set forth in the January 1982 version of FCC Form 301 Section III, that case is inapposite here. Radio Radcliff's initial financial qualifications were approved in the Hearing Designation Order, *supra*, at para. 7, and were based on its original showing of costs and funds available. Moreover, the ALJ denied appellants' motion to enlarge issues filed March 4, 1983, which challenged anew that financial showing. FCC 83M-2549, *supra*, para. 6. Because there has not been a financial issue specified against it in this case, Radio Radcliff is not precluded by the holding of *South Florida* from simply certifying that it has sufficient net liquid assets to cover its additional costs. Nevertheless, should Radio Radcliff be unable to certify that it remains financially qualified, the ALJ should then add an appropriate financial issue against it.

13. ACCORDINGLY, IT IS ORDERED, That the motion for leave to file reply filed jointly November 30, 1983 and the motion to exceed page limit filed jointly November 10, 1983 by Elizabethtown Broadcasting Company and Mid-Kentucky Radio Corp. ARE GRANTED, and the reply pleadings ARE ACCEPTED; and

14. IT IS FURTHER ORDERED, That the appeal filed jointly by Elizabethtown Broadcasting Company and Mid-Kentucky Radio

Corp. on September 1, 1983 IS GRANTED TO THE EXTENT INDICATED HEREIN; and

15. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for further proceedings in accordance with paragraphs 8 and 12, *supra*.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

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[illegible] *GSM Media Corp.*, FCC 83R-64, released Sept. [illegible] [illegible] under this issue.

11. *Financial Issue.* Finally, the appellants claim that the ALJ erred in refusing to add a financial qualifications issue against Radio Radcliff. They point out that Radio Radcliff originally estimated its costs to be $231,626 for construction and initial operation from a single transmitter site and showed available funds of $234,250. However, when the settlement agreements in this proceeding were filed, Radio Radcliff did not show the availability of additional funds that might be needed to cover both the $4,825 that it has agreed to pay in consideration for the withdrawal of Lincoln's application and the extra costs that will likely accrue as a result of constructing and operating from separate daytime and nighttime transmitters.

12. Since the proceeding is being remanded on other grounds, we will afford Radio Radcliff an opportunity to certify to the ALJ that its engineering amendment specifying dual transmitter sites and its participation in the settlement agreement with Lincoln have not rendered it financially unqualified. *See Revision of Form 301*, 50 RR 2d 381, 382 (1981). Although the Commission recently ruled in *South Florida Broadcasting Co., Inc.*, 53 RR 2d 1883, 1884 (1983), that it would not allow applicants in hearing who had filed their applications on the 1977 version of FCC Form 301 to initially establish their financial qualifications by the new certification procedure set forth in the January 1982 version of FCC Form 301 Section III, that case is inapposite here. Radio Radcliff's initial financial qualifications were approved in the Hearing Designation Order, *supra*, at para. 7, and were based on its original showing of costs and funds available. Moreover, the ALJ denied appellants' motion to enlarge issues filed March 4, 1983, which challenged anew that financial showing. FCC 83M-2049, *supra*, para. 8. Because there has not been a financial issue specified against it in this case, Radio Radcliff is not precluded by the holding of *South Florida* from simply certifying that it has sufficient net liquid assets to cover its additional costs. Nevertheless, should Radio Radcliff be unable to certify that it remains financially qualified, the ALJ should then add an appropriate financial issue against it.

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14. IT IS FURTHER ORDERED, That the appeal filed jointly by Elizabethtown Broadcasting Company and Mid-Kentucky Radio

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